

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

: Civil Action No.
STEVES AND SONS, INC., : 3:16cv545
: February 6, 2018
vs. :
JELD-WEN, INC. :
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COMPLETE TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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09:35:05 1 THE CLERK: Day five. Case No. 3:16cv545.

09:42:57 2 *Steves and Sons, Inc. v. Jeld-Wen, Inc.*

09:35:06 3 The plaintiff is represented by Lewis Powell, III,
09:35:06 4 Maya Eckstein, Glenn Pomerantz, Kuruvilla Olasa, and Emily
09:35:06 5 Huberty.

09:35:06 6 The defendant is represented by Michael Smith,
09:35:06 7 Margaret -- Margaret Peggy Zwisler, Alfred Pfeiffer and
09:35:06 8 Jason Daniels.

09:35:06 9 Are counsel ready to proceed?

09:35:33 10 MR. POWELL: Good morning, Your Honor. Steves
09:35:34 11 is ready.

09:35:35 12 MS. ZWISLER: Good morning. We're ready as
09:35:36 13 well.

09:36:05 14 THE COURT: We've been told that Juror Number 10
09:36:07 15 called the jury clerk this morning, told her she's so sick
09:36:10 16 she can't get out of bed. She didn't describe the illness
09:36:14 17 any further than that. I think you all have been told
09:36:16 18 that. I don't know what else to do other than to excuse
09:36:20 19 the juror and go forward. That's Ms. D'Agostino, Number
09:36:34 20 10. I don't know what else to do.

09:36:44 21 MR. POWELL: Nor do I.

09:36:45 22 THE COURT: The only other choice is to hold up
09:36:45 23 the trial until she gets better. We don't even know if
09:36:50 24 she's going to get better -- I mean when she's going to
09:36:53 25 get better. Let's presume that she will.

09:36:56 1 MS. ZWISLER: Could we give her a day and see
09:36:56 2 if --

09:36:59 3 THE COURT: No.

09:36:59 4 MS. ZWISLER: No.

09:36:59 5 THE COURT: I'm not going to stop this trial and
09:37:01 6 impose on those other people. I just don't understand how
09:37:03 7 we can do that.

09:37:04 8 One of the things that you all have got to realize is
09:37:06 9 that these people are people of ordinary means, giving up
09:37:11 10 their time at a considerable sacrifice, and you all are
09:37:15 11 raking in money like it's going out of style and it's okay
09:37:20 12 for you to be here. It's not okay for them to be here.

09:37:23 13 And in addition to that -- I mean, if I had been able
09:37:26 14 to do it, I would have had another judge come in here and
09:37:30 15 sit while I was sick, but I couldn't do that because of
09:37:33 16 the unusual evidentiary posture of things. It wasn't an
09:37:37 17 option. So -- and I'm sorry that we're losing her, but I
09:37:41 18 don't know what else to do. The alternative is to give
09:37:44 19 another day. Is that what you're saying?

09:37:48 20 MR. POWELL: We completely agree, Your Honor.
09:37:49 21 We think we should press ahead without that juror.

09:37:53 22 THE COURT: All right. Tell the jury clerk.

09:37:59 23 Are we ready for the jury otherwise?

09:38:01 24 MR. POMERANTZ: Your Honor, just one small
09:38:01 25 point.

09:38:02 1 THE COURT: Come to the lectern. Come to the
09:38:03 2 lectern, please, so they can hear you.

09:38:12 3 MR. POMERANTZ: We had inadvertently omitted 17
09:38:16 4 seconds of Mr. Lynch's testimony, the CEO of Masonite,
09:38:17 5 from the depo that we showed the jury. We would like to
09:38:20 6 show that 17 seconds so it's in front of the jury. And we
09:38:23 7 are prepared to do it now or at any time during the day as
09:38:26 8 long as it's before we rest.

09:38:29 9 THE COURT: Is the machinery ready?

09:38:32 10 MR. POMERANTZ: I am told it is.

09:38:34 11 THE COURT: Anybody object?

09:38:36 12 MS. ZWISLER: No, Your Honor. We've told them
09:38:37 13 we don't object.

09:38:39 14 THE COURT: All right.

09:38:39 15 MR. POMERANTZ: And then after that, we're
09:38:41 16 prepared to start with Professor Shapiro.

09:38:43 17 THE COURT: All right. Is this the most
09:38:44 18 critical 17 seconds in history?

09:38:47 19 MR. POMERANTZ: Well, the only reason why it's
09:38:49 20 critical, Your Honor, is because I referred to it in the
09:38:51 21 opening. And so I would very much like to play it to the
09:38:52 22 jury so that they see what I actually said in the opening.

09:38:55 23 THE COURT: Do you know what Bear Bryant said
09:38:57 24 about that kind of thing? He said, That and a nickel will
09:39:03 25 get you a Coke.

09:39:06 1 MR. POMERANTZ: Those are the good old days
09:39:06 2 when --

09:39:06 3 THE COURT: It will cost a nickel. All right.
09:39:07 4 Play it now when they come in.

09:39:12 5 MR. POMERANTZ: Thank you, Your Honor.

09:39:13 6 THE COURT: All right. Mr. Robertson.

09:39:18 7 MR. POWELL: Your Honor, may I explain to the
09:39:20 8 jury why we're doing this?

09:39:22 9 THE COURT: Sure.

09:39:23 10 MR. POWELL: Thank you.

09:40:49 11 (The jury entered the courtroom.)

09:41:31 12 THE COURT: Everybody have their book? Good
09:41:33 13 morning, ladies and gentlemen.

09:41:34 14 All right. Mr. Powell, you had something.

09:41:37 15 MR. POWELL: Good morning, Your Honor.

09:41:38 16 You may remember we played the video deposition of
09:41:41 17 Fred Lynch, the CEO of Masonite. We inadvertently left
09:41:45 18 off about 17 seconds. And with the Court's permission,
09:41:46 19 and no objection from Jeld-Wen's counsel, we'd like to
09:41:51 20 play those 17 seconds for you now.

09:41:58 21 (Video Played.)

09:42:28 22 MR. POMERANTZ: Your Honor, we now call
09:42:31 23 Professor Carl Shapiro.

09:42:33 24 **PROFESSOR CARL SHAPIRO,**
09:42:33 25 called at the instance of the plaintiff, having been first

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duly sworn, testified as follows:

MR. POMERANTZ: Your Honor, may I proceed?

THE COURT: Please.

DIRECT EXAMINATION

BY MR. POMERANTZ:

Q Professor Shapiro, what is your profession?

A I'm an economist.

Q Do you have any graduate degrees in economics?

A Yes. I earned a Ph.D. in economics from MIT.

Q And do you have any other degrees?

A Yes. I have bachelor's degrees in economics and mathematics, and a master's degree in mathematics.

Q And have you been a professor in the field of economics?

A For quite a while. Yes.

Q And when were you first hired as a professor?

A That would be 1980 at Princeton University.

Q And how long did you remain as their professor of economics at Princeton?

A Ten years at Princeton.

Q And then where did you go after Princeton?

A I took a faculty position at the University of California at Berkeley.

Q And how long have you remained as a professor at the

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University of California?

A Since 1990. So that's 28 years.

Q And what is your current position at the University of California?

A I'm now of a professor of the graduate school at the University of California at Berkeley.

Q And do you specialize in any particular area of economics?

A Yes. My field of specialization is called industrial organization economics.

Q What is industrial organization economics?

A It's the field within economics that studies firms, how they compete, how the government regulates business, including issues of innovation, competition, and looking at different markets. So instead of looking at the economy as a whole, we look at individual markets and how the companies compete in those markets.

Q All right. So in that answer, you said that you looked at how firm compete. What did you mean by "firms"?

A Well, I use the word firms, companies, businesses. They're all interchangeable.

Q Okay. And have you heard the term antitrust?

A I certainly have.

Q And what do you understand that to refer to?

A Well, antitrust is, in the first instance, a body of

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1 law that we have in the United States. But I describe
2 myself as an antitrust economist, which is an applied part
3 of the industrial organization field where we take our
4 studies of markets and businesses and we use it to inform
5 the legal issues that surround competition, particularly
6 in the United States.

7 Q So I want to focus specifically on your experience in
8 analyzing whether a particular merger or acquisition
9 substantially lessens competition. What experience do you
10 have in analyzing whether a merger or acquisition
11 substantially lessens competition?

12 A Well, I have two areas of expertise, I would say, or
13 experience. One would be my academic work, research,
14 writings, publications, teaching. And the other would be
15 work as a practitioner, as a consultant studying mergers
16 and offering opinions such as I am doing here today.

17 Q And over the course of your career, how many
18 different mergers and acquisitions have you analyzed in
19 order to determine whether they substantially lessened
20 competition?

21 A It's quite a few. I'd say -- let's say 50 to 100
22 over a number of quite a few years.

23 Q Have you authored any research papers or articles
24 that pertain to how one analyzes whether a merger or
25 acquisition substantially lessens competition?

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09:46:24 1 A Yes. I've written a number of articles. The mergers
09:46:28 2 areas is one of my particular areas of specialty in terms
09:46:32 3 of research. Going back to 1990, I think, or 1989, a
09:46:38 4 series of articles about the economics of mergers and
09:46:42 5 their effect on competition.

09:46:45 6 Q And as you are doing here today, have you testified
09:46:48 7 previously in court about whether a merger or acquisition
09:46:51 8 substantially lessens competition?

09:46:54 9 A Yes, I have done that previously.

09:46:56 10 Q Approximately how many times?

09:46:58 11 A Half a dozen, I would say.

09:47:00 12 Q And in the course of those six, or so, times that
09:47:03 13 you've testified in court about a merger, how many times
09:47:06 14 did you conclude that the merger did substantially lessen
09:47:10 15 competition?

09:47:12 16 A I guess it's about equally split. I mean, I should
09:47:17 17 clarify. I get asked to look at mergers and then I offer
09:47:23 18 my opinion. Then sometimes then I end up testifying about
09:47:25 19 them, and it's probably equally split.

09:47:27 20 Q So equally split, meaning the times that you've
09:47:29 21 previously testified in court about a merger, about half
09:47:31 22 the time you find that the merger does lessen competition
09:47:34 23 and about half the time that you find that it doesn't. Is
09:47:38 24 that what you're saying?

09:47:39 25 A Roughly. I think that's right. Among this half a

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dozen or so. It's a small sample.

Q And in that small sample, what was the difference that led you to conclude that sometimes the merger did substantially lessen competition and other times it did not?

A Well, it's a very fact-based inquiry, I would say. Each -- one of the things that interests me, while I'm in my field of industrial organization, is different markets are very, very different, and so the mergers are very different. The companies, the markets it takes place in, when it happens. So it's fact-intensive.

And that's what I was trying to say before. I get asked to look at a merger. I do an investigation or research, study. And then in some cases, I reach the conclusion that it's problematic from the point of view of competition. In other cases, not.

Q Now, you previously said that you had written a number of articles that pertain to the economic analysis of mergers and acquisitions, correct?

A Yes.

Q And have you written articles on other subjects of economics?

A Oh, yes.

Q In total, how many different articles have you written that pertain to the field of economics?

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09:48:45 1 A I would say 100 plus.

09:48:48 2 Q And have you also served on the editorial boards of
09:48:52 3 economic journals?

09:48:53 4 A Yes, I have.

09:48:54 5 Q What is an economic journal?

09:48:56 6 A Well, in most fields of academics, and certainly
09:49:01 7 economics, faculty members, when they have their research,
09:49:05 8 they publish it in journals. So they're peer reviewed by
09:49:09 9 other scholars in the area. And the editors oversee that
09:49:12 10 process.

09:49:13 11 And so these are journals that publish peer-reviewed
09:49:17 12 research, which is how the field advances, and I've edited
09:49:20 13 or coedited or been associate editor of several journals.

09:49:24 14 Q And have -- can you give examples of any of the
09:49:27 15 editorial boards that you've served on?

09:49:31 16 A Oh, sure. One I'm particularly proud of was founding
09:49:34 17 the -- being the founding coeditor of the Journal of
09:49:37 18 Economic Perspectives, which was established by the
09:49:41 19 American Economic Association to communicate in a range of
09:49:47 20 areas of economics, the advances of economic thinking both
09:49:53 21 to economists and more broadly. And that's had a lot of
09:49:56 22 impact. It's been about 30 years now. It's been very
09:50:02 23 successful. I'm proud of that one.

09:50:03 24 Q Have you served on something called the President's
09:50:04 25 Council of Economic Advisors?

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A Yes, I have.

Q Could you explain to the jury what the President's Council of Economic Advisors is?

A Sure. In 1946, Congress established the Council of Economic Advisors to give advice to the President of the United States regarding -- excuse me -- all matter of economic -- a wide range of economic issues. And there are three members confirmed by the Senate. I was one of those members in 2011 and 2012.

Q And so you -- during those two years, you provided economic advice to the President of the United States?

A That's correct.

Q What -- what were the general subject matters? If you could give us a few examples of the kinds of things -- the kinds of subject matters that you provided advice to the president on?

A Well, one of the things that was exciting, but a little daunting about that, was the range of issues. So we handled issues of trade with China, issues of environmental regulation. Just actually areas that I specifically worked on. There were other members working on other topics. The housing finance and dealing with the Great Recession and the impact on the housing market, and patents.

We -- we got a new patent law through in 2011.

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That's an area of expertise of mine as well, economics of patents and innovation. That was an exciting piece. We had new major legislation. So those are some examples.

Q Now, I think you testified that you also work as an economic consultant, correct?

A I do.

Q And are you affiliated with a particular economic consulting firm?

A Yes. It's called Charles River Associates.

Q And just in general terms, what do you do as a consultant working with Charles River?

A In general terms, we have clients -- in this case, Steves -- that ask us to look -- ask me, usually, to look at an economic issue. And we do work for them. There's a number of employees at the firm, Charles River Associates, who then support my work. And I can't do it all myself. They are employees at Charles River Associates. So we form a team to analyze these economic issues, and the company is set up for that purpose.

MR. POMERANTZ: Your Honor, I would tender Professor Carl Shapiro as an expert in economics with a specialized expertise in industrial organization.

THE COURT: Any objection?

MR. PFEIFFER: No objection, Your Honor.

THE COURT: He's accepted as an expert in those

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09:52:30 1 areas.

09:52:30 2 Ladies and gentlemen, I'll give you instructions
09:52:32 3 about how to consider expert testimony a little bit later
09:52:37 4 because experts are allowed to do something that other
09:52:40 5 witnesses generally aren't allowed to do. They can give
09:52:43 6 opinions if they are qualified by virtue of education and
09:52:47 7 training in some technical or specialized area.

09:52:52 8 He's been accepted as an expert in these areas and
09:52:55 9 will be permitted to give opinions. I'll tell you later
09:52:59 10 the parameters of judging expert testimony. As a general
09:53:04 11 proposition, you consider his testimony just like you do
09:53:07 12 anybody else's. You're free to accept it, reject it in
09:53:11 13 whole or in part. That's enough for now.

09:53:14 14 MR. POMERANTZ: Thank you, Your Honor.
09:53:15 15 Appreciate that.

09:53:17 16 Q Professor Shapiro, in preparing for your testimony
09:53:19 17 today, did you create some slides to help describe your
09:53:22 18 opinions to the jury?

09:53:23 19 A Yes, I did.

09:53:24 20 Q All right. So let's turn to the first slide. Could
09:53:27 21 you explain to the jury what this slide shows?

09:53:30 22 A This slide poses the question that I am
09:53:35 23 investigating, or trying to answer: "Does Jeld-Wen's
09:53:38 24 acquisition of CMI substantially lessen competition in a
09:53:41 25 relevant market?"

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09:53:43 1 THE COURT: Excuse me a minute. Did somebody
09:53:45 2 re-sort that mess of papers I gave you yesterday to give
09:53:49 3 me a copy?

09:53:51 4 MR. POMERANTZ: I'm sorry, Your Honor. Yes.
09:53:52 5 And if I may approach, Your Honor, with --

09:53:59 6 THE COURT: Mr. Martecchini has his own. Thank
09:54:05 7 you. Pardon on my interruption.

09:54:13 8 Q All right. So this was the question that Steves
09:54:15 9 asked you to study, correct?

09:54:16 10 A Yes, sir.

09:54:17 11 Q All right. So let's turn to the first -- let's turn
09:54:20 12 to the next slide. What basically happened when Jeld-Wen
09:54:23 13 acquired CraftMaster?

09:54:26 14 A Well, we're focusing on door skins, interior molded
09:54:32 15 door skins. And we'll talk more about that soon. The
09:54:35 16 fundamental change that was caused by the merger, in terms
09:54:39 17 of the market, was a move from three suppliers, Jeld-Wen
09:54:44 18 CraftMaster and Masonite, just to two, since CraftMaster
09:54:48 19 has been acquired by Jeld-Wen.

09:54:50 20 Q And in the way that economists talk, would they refer
09:54:54 21 to this as a three to two merger?

09:54:57 22 A Sure.

09:54:58 23 Q And what is your bottom-line conclusion as to whether
09:55:02 24 this merger initially lessened competition in the relevant
09:55:07 25 market?

Shaprio - Direct

09:55:07 1 A I believe that this merger has substantially lessened
09:55:11 2 competition in the market for interior molded door skins
09:55:14 3 used in the United States, and I think it's likely that
09:55:19 4 lessening of competition will continue into the future.

09:55:23 5 Q Now, what information did you rely upon to reach that
09:55:27 6 conclusion?

09:55:28 7 A Well, I've been looking at this for somewhat over a
09:55:32 8 year. We have a lot of information. I say "we" because
09:55:35 9 I'm thinking of my team at Charles River Associates and
09:55:38 10 myself doing this together. We have quite a bit of
09:55:42 11 information from the companies, Jeld-Wen and Steves, those
09:55:48 12 two companies. Additionally, information from Masonite,
09:55:53 13 for example, in terms of documents. We have testimony
09:55:56 14 from the witnesses, which was available to me earlier in
09:56:00 15 the form of deposition. Those are the main sources. Some
09:56:06 16 public sources of information that I used as well, such as
09:56:09 17 housing starts we'll talk about. And, of course, applying
09:56:13 18 my expertise using that information.

09:56:16 19 Q So you said that some of the information that you
09:56:18 20 relied upon were the documents that were in Jeld-Wen's and
09:56:22 21 Steves' and Masonite's files, correct?

09:56:26 22 A Yes.

09:56:26 23 Q Why do you consider those kinds of documents in doing
09:56:29 24 your analysis?

09:56:30 25 A Well, it's very important, like I said, since markets

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are so different, to understand this market and, of course, the companies that are participating in the market, how they see things, who are they competing against, what are their customers. And so the documents they create at the time -- we're going to spend a while talking about back in 2012 because that's when the merger happened. Documents created then and later are very informative to me about how the companies were thinking about the markets and why they took the actions they did that I'm trying to understand. So that's a high-grade source of information, in my view.

Q And is it fair to say that when economists look at mergers to assess their competitive effects, looking at the company's internal documents are one of the primary sources they use to evaluate whether the merger is going to have anticompetitive effects?

A Yes. This is standard to have access to and use those documents, together with the data.

Q In the course of the last year, as you were doing your work, did you prepare any written reports that described your analysis in this case?

A Yes. I prepared three reports over the course of the past year.

Q And why did it come about that you prepared three reports?

Shaprio - Direct

09:57:50 1 A Well, it's pretty common to do two. I did one to
09:57:55 2 explain my opinion. That was about a year ago now, based
09:58:01 3 on what was available to me, information then.

09:58:04 4 Then I did a second one, in part, to respond to
09:58:08 5 Professor Snyder, who is the economic expert that Jeld-Wen
09:58:11 6 has brought in, but also to update my own views based on
09:58:15 7 additional information that came in. That was between
09:58:17 8 January and, I think, May of last year.

09:58:20 9 And then in this case, somewhat unusually, the
09:58:22 10 information kept coming in, significant information, and
09:58:25 11 so there was a third report that was, I think, in
09:58:30 12 September. So mostly it was because information --
09:58:32 13 important information came in over time.

09:58:34 14 Q And so you prepared reports and Professor Snyder
09:58:37 15 prepared reports, correct?

09:58:39 16 A Yes.

09:58:40 17 MR. POMERANTZ: Your Honor, may I approach to
09:58:41 18 hand those reports to Professor Shapiro so he has them in
09:58:45 19 the event he needs to refer to them?

09:58:47 20 THE COURT: They haven't been admitted into
09:58:49 21 evidence.

09:58:50 22 MR. POMERANTZ: And I'm not seeking to admit
09:58:50 23 them into evidence. I'm just simply so that --

09:58:51 24 THE COURT: Give him a copy in case he needs it.

09:58:54 25 MR. POMERANTZ: Thank you. Your Honor, I also

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1 have copies for Your Honor. Do you want them now?

2 THE COURT: In case you refer to them. Thank
3 you.

4 MR. POMERANTZ: And, Your Honor, I've also
5 provided copies to Mr. Pfeiffer.

6 Q All right. Professor Shapiro, let's go to the next
7 slide that you created. Could you explain to the jury
8 what these three steps describe?

9 A Certainly. So I think of my analysis and then my
10 conclusions as falling into three phrases; 1, 2, 3 here.
11 First one, October 2012, looking at market conditions
12 around the time of the merger. So what was the market
13 like before the merger? How did the merger change the
14 market? That's the first phase.

15 And then the second phase is since, in this case, the
16 merger took place a little over five years ago, what's
17 happened in that period of time since the merger to now?
18 Obviously, one wants to see if we're understanding what
19 effect did the merger have. We have five years of
20 experience. What can we make of that? That's the second
21 phase.

22 And then the third phase is what's likely to happen
23 going forward as a result of the merger? Will things
24 change? We have five years' experience, but the clock
25 keeps ticking. We look ahead.

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Q All right. So let's look at the first step of your analysis here. What did you conclude after evaluating the market conditions at the time of the merger?

A At the time of the merger, the merger, as I said, was three to two. We're going to measure that a little more precisely. And so the -- the merger substantially reduced the choices for customers, basically the customers who are buying these door skins in the United States, from three to two. And that's generally worrisome to an antitrust economist in terms of reduced competition, that there are only two suppliers instead of three. So that kind of hits you right away when you look at the merger at that time.

Q All right. And let's go to the second step of your analysis. What did you conclude after evaluating what happened to the competition in the last five years?

A So I have found that the effects of the merger have been harmful to the customers, not just Steves. Again, when I say "customers" here, I mean the customers buying interior molded door skins. So you've heard of Lynden and Haley. That they have been harmed by this merger. And that's the main thing we look at to see whether the merger lessened competition.

Q All right. And then let's go to the third step. What did you conclude after evaluating how the merger is likely to affect competition in the future?

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10:02:03 1 A I've concluded that these harms are likely to
10:02:05 2 continue. Of course, the future is a bit harder to tell
10:02:10 3 than the past, but that is what the indications are.

10:02:13 4 Q All right. So let's go to -- in a little bit more
10:02:17 5 detail about step one of your analysis. Did you examine
10:02:23 6 the business setting that existed at the time that this
10:02:27 7 merger took place?

10:02:28 8 A Yes.

10:02:28 9 Q And what did you find?

10:02:30 10 A Well, the start of any merger analysis for an
10:02:34 11 economist is to understand the market and the context.
10:02:37 12 And so we -- I knew we were looking, in the first
10:02:43 13 instance, at interior molded door skins. So you first
10:02:46 14 want to look at who are the suppliers, who are the
10:02:49 15 customers. Okay. And the first thing I learned, really,
10:02:51 16 was that there are three suppliers.

10:02:54 17 Q Let me go to the slide that you created to help
10:02:57 18 explain this point, Professor Shapiro. And let me get
10:03:00 19 myself back to the right place in the outline. All right.

10:03:06 20 So using this chart, can you describe this business
10:03:09 21 setting that existed before the merger?

10:03:13 22 A Yes. So there were three door skin suppliers. The
10:03:17 23 focus is on the United States and the -- those -- the use
10:03:21 24 of door skins in the United States. And you've heard a
10:03:24 25 lot about these three. So I think you know who they are.

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10:03:29 1 Those are the only three.

10:03:30 2 Q All right. So now explain what we have here.

10:03:32 3 A So this is depicting, at the lower level, the door
10:03:36 4 skin customers. And you see there the door skin customers
10:03:40 5 are the companies that are making doors because that's how
10:03:42 6 you use the door skins. And we have the three bigger
10:03:49 7 companies here. Jeld-Wen, CraftMaster and Masonite are
10:03:53 8 also making doors. So they are using the door skins. So
10:03:57 9 they -- to an economist, they are also door skin
10:04:00 10 customers. And we have a number of the -- as shown here
10:04:04 11 in yellow, the smaller door manufacturers who are buying
10:04:07 12 the door skins from these three suppliers shown at the
10:04:11 13 top.

10:04:12 14 Q So, Professor Shapiro, you keep using the term door
10:04:16 15 skins. I just want to make sure the jury is clear on
10:04:19 16 this. When you use the term door skins, are you referring
10:04:20 17 to interior molded door skins?

10:04:22 18 A Yes, I am.

10:04:22 19 Q The kind that we see on, for example, these two doors
10:04:25 20 over here?

10:04:26 21 A Yes.

10:04:27 22 Q All right. Now, you said that Jeld-Wen, CraftMaster
10:04:29 23 and Masonite also need door skins, correct?

10:04:32 24 A Certainly. They are making interior molded doors.

10:04:35 25 Q All right. So where do they get -- where were they

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getting their door skins from before the merger?

THE COURT: Who is "they"?

Q I'm sorry. Where was Jeld-Wen, CraftMaster and Masonite getting door skins from?

A Primarily from their own operations. I think you've probably -- you've heard the term they're vertically integrated, which means they make the doors and they make their own door skins. They're at both levels. So they have their own internal sources of supply is another way to put it.

Q And does that vertical integration, that arrangement there, does that affect your analysis of the business setting that existed before and after the merger?

A Yes. It's very important for understanding the economic incentives of the companies involved.

Q And why is it important to -- to the economic incentives of the parties?

A Well, take Jeld-Wen for example. When they are considering selling door skins to Steves, they recognize that Steves, in addition to being a customer of theirs for door skins, it's also a competitor of theirs in selling doors. And so that's a dynamic that is important for an economist to keep track of.

Q So before the merger, was Jeld-Wen not only providing door skins to itself, but also to those little yellow

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10:05:50 1 circles there, the small door manufacturers?

10:05:54 2 A Yes. They were supplying door skins to all of these
10:05:58 3 independent door manufacturers.

10:06:00 4 Q And was that true of CraftMaster and Masonite as
10:06:03 5 well?

10:06:04 6 A Well, not necessarily to all of them. But they were
10:06:07 7 doing -- they were selling the door skins, all three of
10:06:10 8 them, to some of the independent door manufacturers.

10:06:13 9 Q So why would a company like Jeld-Wen sell any of its
10:06:17 10 door skins to someone like Steves who was competing with
10:06:20 11 them as a door manufacturer?

10:06:22 12 A Well, that's an important point. When Jeld-Wen is
10:06:26 13 thinking about -- so as an economist, that's kind of the
10:06:30 14 preface for when I say these things.

10:06:33 15 When Jeld-Wen is thinking about -- so I can't read
10:06:35 16 their minds, but I'm thinking about economic incentives.
10:06:38 17 When they are thinking, Should we sell a door skin to
10:06:41 18 Steves, well, they are competing with us in doors. So
10:06:43 19 maybe you think not so much. But they recognized right
10:06:47 20 before the merger that if they don't sell the door skins,
10:06:50 21 Steves is going to get the door skin from Masonite or
10:06:54 22 CraftMaster. So it still makes sense to sell the door
10:06:57 23 skin to Steves because somebody is going to sell the door
10:07:01 24 skin to Steves. So long as Jeld-Wen is making a profit
10:07:06 25 margin on that sale, it's better to do it even though

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10:07:06 1 Steves is competing with them. And that was the situation
10:07:09 2 prior to the merger. We'll see some specific examples of
10:07:14 3 that.

10:07:14 4 Q All right. So let's complete the structure of the
10:07:16 5 industry. What does this slide show?

10:07:19 6 A So I've just filled out the further downstream, as an
10:07:22 7 economist would describe it. The door skins get put into
10:07:27 8 the doors by the door manufacturers, and then the doors
10:07:28 9 are sold to retailers and home builders, the two main
10:07:31 10 channels. And then in the end, they are purchased and put
10:07:35 11 into homes. So the final user are homeowners. That's
10:07:40 12 what it's showing.

10:07:41 13 Q All right. So as you say in the top of your slide
10:07:44 14 here, this is the industry structure that existed before
10:07:47 15 the merger, correct?

10:07:49 16 A Yes.

10:07:50 17 Q And did you look into the extent of competition
10:07:54 18 between the door skin manufacturers, the door skin
10:07:58 19 suppliers, before the merger?

10:08:00 20 A Oh, yes. Very much.

10:08:02 21 Q In evaluating the effects of a merger on competition,
10:08:05 22 why would an economist look at the way competition was
10:08:09 23 working before the merger?

10:08:11 24 A Well, remember, the ultimate -- the question I'm
10:08:13 25 trying to answer is did the merger substantially lessen

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10:08:16 1 competition. So we first see what did competition look
10:08:21 2 like beforehand and then compare that to after. That's
10:08:24 3 the exercise. So we -- that's our starting point is
10:08:27 4 competition before the merger.

10:08:28 5 Q And what kind of information would an economist look
10:08:31 6 to to try to determine how competition was working before
10:08:35 7 the merger?

10:08:36 8 A Well, there are a number of different things we look
10:08:39 9 at. First, are the companies competing to win business?
10:08:45 10 You know, are they competing to win customers? Are we
10:08:50 11 going to look at their -- how successful are they in doing
10:08:54 12 so? Those are some of the things.

10:08:55 13 Q And what kind of information would you look at to see
10:08:59 14 how they were competing with each other before the merger?
10:09:02 15 What's available to you, for example, in this case?

10:09:05 16 A Well, we have information on prices. We're going to
10:09:08 17 measure market shares. We have -- we're looking for
10:09:11 18 episodes in which competition played out. Those are some
10:09:16 19 of the major things.

10:09:17 20 Q And did you find that information, for example, in
10:09:19 21 some of the documents that Steves and Jeld-Wen produced in
10:09:21 22 this case?

10:09:23 23 A Certainly. Yes. There's a lot in there from that
10:09:25 24 era. Now talking about 2011, 2012, leading up to the
10:09:30 25 merger.

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Q All right. And so what did you discover regarding competition before the merger and how it -- and what kind of competition existed in the supply of door skins?

A We -- I was able to detect or observe and study two significant episodes of competition that I'm highlighting here. Competition for a long-term agreement with Steves, again, to sell door skins, and second one, competition to sell a particular type of door skins, CARB compliant, that we'll explain in a moment.

Q So let's start with your first example of competition before the merger. What evidence of competition did you see in connection with Steves' efforts to get a long-term supply agreement that culminated, I take it, in 2012?

A Yes. That's right. So there was what I would call a very informative -- I would say nice, to me as an economist, nice episode of the companies competing. Jeld-Wen, Masonite, CraftMaster competing to win Steves' business. Steves was interested in a long-term agreement, and they all wanted that business. That was around 2011, into 2012.

Q All right. And so you said that all three of the companies were competing for the long-term supply agreement?

A Yes.

Q All right. And so let's go to the next document.

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1 Could you tell the jury what this document is?

2 A This is the price list that Jeld-Wen sent to Steves.

3 You see the date January 1, 2012. And there's different

4 types of door skins, sizes and models. That was their

5 offer to Steves in terms of the prices for the long-term

6 agreement they were hoping to sign with Steves.

7 Q So in January of 2012, these are the prices that

8 Jeld-Wen was offering to Steves?

9 A Correct.

10 Q And then what is this document?

11 A This is Masonite's offer. It was the next month.

12 You see the date February 23rd. Again, the prices -- a

13 series of prices. This is their offer. And I have

14 highlighted in the red there, this was 6 percent lower

15 than Jeld-Wen's offer.

16 Q By Jeld-Wen's offer, you're talking about this one

17 right here? In other words, the January offer by Jeld-Wen

18 was basically responded to by Masonite in February?

19 A The Masonite February offer was 6 percent less than

20 the Jeld-Wen January offer.

21 Q All right. And then let's go to the next document.

22 What is this telling us?

23 A So this is Jeld-Wen's May -- well, it's an offer, but

24 this is the one that was accepted. So this is actually

25 what they agreed upon. And this was showing there

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5.1 percent less than Jeld-Wen had initially offered.

They came back a few months later, after the Masonite

offer, with this lower set of prices.

Q So if I understand what you're saying, this was --

right here, this was Jeld-Wen's initial offer to Steves --

or at least -- I don't know if it was initial, but the one

they made in January 2012, correct?

A Yes.

Q And then after Masonite made a competing and lower

bid, Jeld-Wen comes back and lowers their price, correct?

A That's what happened.

Q And they lowered it by 5.1 percent, compared to what

they had offered in January?

A Yes.

Q Okay. Is that 5 percent decrease in price a big deal

to Steves?

A Well, I calculated how much Steves would save as a

result of that.

Q Okay. So let's go to that calculation.

A Okay.

Q Could you explain to the jury what this is showing?

A Yes. So the title here, "Steves door skin purchase

cost." So what I calculated was how much would it cost

Steves to buy all the door skins they need at the

different prices. So you take the price list and you

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10:13:18 1 apply it to their door skins quantities of the different
10:13:22 2 types. You can see in the corner here, I used the 2011
10:13:26 3 quantities for this purposes. Steves' 2011 quantities.

10:13:31 4 So following that, the first -- the January Jeld-Wen
10:13:34 5 offer, it would have cost Steves 19.87 million for the
10:13:39 6 door skins. The Masonite offer, you see the lower
10:13:43 7 figures, 18.64. And then the Jeld-Wen offer that was
10:13:48 8 accepted in May, 18.86 million.

10:13:51 9 And by comparing that 18.86 million on the right with
10:13:56 10 the 19.87 on the left, Jeld-Wen's first -- well, January
10:14:00 11 offer, the difference is 1.01 million. That's the
10:14:04 12 5.1 percent drop I mentioned before. So just to scale it,
10:14:07 13 that's a million dollars a year savings for Steves between
10:14:11 14 the two Jeld-Wen offers.

10:14:12 15 Q All right. And so the competition with Masonite led
10:14:16 16 to that price reduction, correct?

10:14:18 17 A Yes.

10:14:18 18 Q All right. So let's go to your second example of
10:14:22 19 competition before the merger. Could you explain to the
10:14:25 20 jury what you're referring to when you say competition to
10:14:28 21 sell CARB compliant door skins?

10:14:32 22 A Yes. So, first, what are CARB compliant door skins?
10:14:36 23 These are door skins that comply with certain
10:14:39 24 environmental regulations that were coming into force at
10:14:39 25 that time. That is to say, around 2010 and '11.

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10:14:42 1 And so Steves was looking to buy door skins that
10:14:46 2 complied with the environmental rules, and there was
10:14:49 3 competition among the three suppliers to win that
10:14:53 4 business.

10:14:54 5 Q All right. So let's talk about that competition.
10:14:58 6 Could you explain what you found?

10:14:59 7 A Certainly. So this is illustrating that Steves had a
10:15:05 8 choice between the three, exercised that choice and saved
10:15:11 9 some money. So what's shown here on the left is Jeld-Wen.
10:15:14 10 And what I was able to calculate was how much higher
10:15:19 11 Jeld-Wen's prices were for these CARB compliant door skins
10:15:25 12 than the previous ones that hadn't been compliant.

10:15:28 13 I looked at the -- one of the more popular models
10:15:31 14 here just to illustrate, which are the 6-foot 8-inch door
10:15:35 15 skins. And I found that Jeld-Wen was charging a premium
10:15:40 16 in 2010 of 13.5 percent -- that's what's shown up there in
10:15:46 17 the left corner -- for the CARB compliant door skins.
10:15:49 18 That's extra that they were asking Steves to pay for the
10:15:52 19 door skin that was CARB compliant versus the older one,
10:15:55 20 older model, that was not. And that was 2010.

10:16:01 21 By 2011, Jeld-Wen had increased that premium to
10:16:06 22 27.6 percent. Of course, Steves was unhappy about this.
10:16:12 23 And as a result, that's what these yellow arrows are meant
10:16:15 24 to depict. Steves significantly moved its purchases of
10:16:19 25 these door skins away from Jeld-Wen and toward CraftMaster

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and Masonite.

Now, how did that help them? It helped them because CraftMaster and Masonite were not charging a premium for the CARB compliant door skins. So there was -- there got to be a big difference in price, and Steves avoided, to a considerable extent, paying the Jeld-Wen premium by moving their business.

Q All right. And let's look at how much business they actually moved away from Jeld-Wen and to CraftMaster and Masonite because they were offering lower prices. Could you explain this chart to the jury?

A I'm happy to do so. So if you look at the -- the axis, the horizontal axis at the bottom, you'll see 2009, '10, '11. So we're tracking those three years. The vertical axis is measuring how much of Steves door skin business they gave to each of the three suppliers.

So starting in 2009 -- Jeld-Wen is red here. So Jeld-Wen got 83 percent of the business from Steves in 2009, CraftMaster got the balance, and Masonite wasn't selling to Steves that year in any significant amount.

And then after that, then we had the -- in 2010, remember, that's when Jeld-Wen started to have the 13 percent, a significant premium for the CARB compliant door skins. Steves, I said, moved their business away. They moved Jeld-Wen share from 83 percent all the way down

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10:17:50 1 to 56 percent. That's a big move in one year. You can
10:17:53 2 see they were moving the business to CraftMaster. It went
10:17:56 3 up from 17 percent to 44 percent. That's the blue.

10:18:00 4 And then we go on to 2011. Jeld-Wen's share went
10:18:04 5 further down, again substantially, all the way down to
10:18:08 6 27 percent. And in that year, there was a big shift of
10:18:15 7 Steves purchasing Masonite. So this is a very nice
10:18:19 8 example, in my view, of a customer moving their purchases
10:18:21 9 when one company tries to charge a higher price. That's
10:18:25 10 competition in action.

10:18:27 11 Q All right. So, Professor Shapiro, these two
10:18:31 12 examples, the long-term supply agreement competition and
10:18:34 13 the CARB example, those are just examples of the way
10:18:38 14 competition existed before the merger, correct?

10:18:41 15 A Yes. That's right.

10:18:42 16 Q So let's go look at the merger itself. Could you
10:18:45 17 explain what changed when the merger occurred?

10:18:49 18 A So this slide depicts the three suppliers of door
10:18:55 19 skins, and now we're focusing on the independent door
10:18:59 20 manufacturers below.

10:19:01 21 Q So let me click to the next one and then you can use
10:19:05 22 this animation to explain what just happened.

10:19:08 23 A So the acquisition reduces the number of door skins
10:19:14 24 suppliers from three to two, as we've talked about. And
10:19:17 25 so this -- now the diagram shows the new market structure

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10:19:21 1 and with the two suppliers. I'm not drawing in here the
10:19:26 2 other -- Jeld-Wen and Masonite as door manufacturers. We
10:19:29 3 had that before. I'm focusing on the independent door
10:19:32 4 manufacturers because they are the ones who need to
10:19:34 5 purchase the door skins and now have only two choices.

10:19:38 6 Q And as an economist, are you concerned that the
10:19:41 7 merger reduced the number of competitors from three to
10:19:44 8 two?

10:19:44 9 A Well, as an antitrust economist, like I said before,
10:19:48 10 it jumps right out at you, that's substantially increasing
10:19:54 11 market concentration, as we would call it. And so that
10:19:57 12 immediately raises concerns. It doesn't answer the
10:20:00 13 question, but it immediately raises concerns.

10:20:02 14 Q All right. So have you heard of something called
10:20:06 15 market shares?

10:20:08 16 A Of course.

10:20:08 17 Q And did you consider market shares when you were
10:20:11 18 evaluating Masonite and Jeld-Wen and CraftMaster as
10:20:15 19 competitors before the merger and then looking at what
10:20:18 20 happened after the merger?

10:20:19 21 A Yes, I did.

10:20:20 22 Q So could you explain to the jury what market shares
10:20:23 23 refers to?

10:20:24 24 A Just like it sounds. A firm's -- a business' market
10:20:31 25 share is the share of the business during that market that

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they get.

Q Why does an economist look at market shares in order to evaluate what happens when two companies merge?

A Market share is usually the single, best measure of how successful that company is and how important they are as a competitor. Again, there are other things to look at, but it's one of the first things we look at.

Q And does the size of the market shares of the respective competitors matter to your analysis?

A Absolutely. We pay a lot of attention to market shares when doing merger analysis because we're particularly concerned if an important competitor has been acquired as opposed to a minor one.

Q So can you give us an example that the jury may be familiar with of how market share can matter to competition?

A Well, the jury, I am betting, familiar with cell phones in that we've got AT&T, Verizon, Sprint and T-Mobile as the four major providers of cellular service in the United States, and so if AT&T went to merge with T-Mobile, they would be merging with a significant competitor. That would be a four to three type of merger. And that would naturally raise concerns in my mind. If they acquired a tiny company that was just doing a little amount of specialized cell service, it would be a lot less

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concerning.

Q And how do market shares tell you whether a particular company is a meaningful choice for customers?

A Well, it's -- it's simply the idea that a company that has a healthy market share is winning a good amount of business, and that is an indication that they are a significant competitor. Again, we're going to look at other information, but that's a good -- very good starting point. A very important metric.

Q All right. So let's look at what the market shares were in this particular market before the merger. Could you explain to the jury what this is showing?

A Yes. So what I did was look at all the use of interior molded door skins in the United States, and I measured, as best I could, which was quite well, I think, who made those door skins. Okay. And this is in 2012. And here's what I found and reported. You can see the shares. Masonite slightly bigger than Jeld-Wen. CraftMaster number three, but significant as well.

Q And do these shares that you're reflecting here reflect the door skins that Jeld-Wen, Masonite and CraftMaster use themselves as well as the ones they might sell to small door manufacturers?

A Yes. This includes the -- all uses of interior molded door skins in the United States, including the ones

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10:23:28 1 that Masonite and Jeld-Wen use themselves. They are also
10:23:32 2 users -- or we can think of them as customers as well,
10:23:36 3 vertically integrated, like I said.

10:23:38 4 Q And what conclusion do you draw from these market
10:23:41 5 shares?

10:23:43 6 A Well, the -- CraftMaster -- I would focus on
10:23:51 7 16 percent, I guess, because that's the company that's
10:23:54 8 being acquired. And that's a sizable market share. And
10:23:58 9 also, that it's three to two, that you're just getting two
10:24:02 10 big companies left at the end. So we have a way of doing
10:24:07 11 some metrics we're going to talk about.

10:24:10 12 Q I'll get to that in a second.

10:24:12 13 A I tend to go there as well. But CraftMaster, as I
10:24:15 14 think I said before, is a significant player, but they are
10:24:18 15 number three.

10:24:19 16 Q Let's focus a little bit more on the role that
10:24:22 17 CraftMaster was playing in the door skin market before the
10:24:24 18 merger. Could you explain to the jury what this pie chart
10:24:26 19 is reflecting?

10:24:28 20 A So this pie chart looks a lot different, right? The
10:24:32 21 blue is a lot bigger. This is measuring sales to
10:24:35 22 independent door manufacturers in the United States. And
10:24:37 23 CraftMaster has got almost half of those sales. So what's
10:24:41 24 going on here? Why is CraftMaster so much bigger here?

10:24:45 25 Remember, Jeld-Wen and Masonite, they are much bigger

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1 in terms of their downstream operations -- actually,
2 doors -- using their own door skins, that is. And so
3 CraftMaster was selling almost half of the sales to the
4 independents, even though their overall share was only
5 16 percent. So they had a particularly significant role
6 in terms of competing for business from Steves, Haley and
7 Lynden, getting about half of that business. And that's
8 directly relevant for understanding the effects of this
9 merger.

10 Q So I just want to make sure the jury is clear on
11 this. If you look at where Steves and the other smaller
12 independent manufacturers are getting their door skins
13 from in 2012, that's this slide, correct?

14 A That's exactly right.

15 Q Okay. Now, the jury has heard some testimony about
16 foreign imports, getting door skins from Turkey or
17 Romania. Did you find any evidence that there were any
18 meaningful foreign imports at the time of the merger?

19 A No. I looked quite hard for that in all the
20 documents and other evidence available to me, and I did
21 not find any evidence of meaningful imports at this time.

22 Q And has that changed from -- when you've reviewed all
23 the evidence, has that changed between 2012 and today?

24 A Not materially. There now are some imports coming
25 in. A very small number, as far as I know. But in terms

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10:26:22 1 of significance of share of door skins, the imports remain
10:26:27 2 tiny.

10:26:28 3 Q All right. So in your view, did the acquisition of
10:26:34 4 CraftMaster by Jeld-Wen eliminate a meaningful choice for
10:26:38 5 door skin customers?

10:26:39 6 A Absolutely. I don't think there's any question about
10:26:42 7 that.

10:26:43 8 Q Now, is there a particular way that economists use --
10:26:47 9 a method that economists use to evaluate whether a merger
10:26:52 10 has actually eliminated an important choice that existed
10:26:55 11 in the market?

10:26:56 12 A Yes. We have -- we have a measure of market
10:26:58 13 concentration that we use and apply to mergers.

10:27:02 14 Q You've used the term "market concentration" a couple
10:27:05 15 times now. Could you explain to the jury what you mean
10:27:08 16 when you say market concentration?

10:27:09 17 A If we look at a market, we measure -- when we say
10:27:14 18 it's highly concentrated, we mean there's just a few
10:27:18 19 sellers who are getting most of the business. A monopoly
10:27:23 20 would be the extreme case. One company has all the
10:27:25 21 business.

10:27:26 22 The other extreme would be maybe a hundred or
10:27:29 23 hundreds of companies selling, and that would be very
10:27:31 24 unconcentrated. So we have a way of measuring that called
10:27:32 25 the Herfindahl-Hirschman Index. HHI Index. That's our

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standard method of measuring how concentrated a market is.

Q All right. So you said Herfindahl-Hirschman Index, correct?

A I did.

Q Who's Herfindahl and Hirschman?

A Well, the index is pretty old. It's been used at least 40 or 50 years. So these are economists who developed this in the past.

Q And do economists tend to refer to the Herfindahl-Hirschman Index as HHI for short?

A That's a lot easier to say.

Q Okay. So let's look at what this index -- how it works. What do economists use this index for?

A So as I think I hinted, or said, it's a way of measuring how concentrated a market is. That's the purpose.

Q All right. So let's start understanding this. I put some more information on this slide. Can you explain to the jury what this is showing?

A Okay. So I just want to make sure you understand the scale because it's specialized in my area.

Zero, if we got an index of zero -- let me start at the top. If we had a monopoly, it's 10,000. That's the very top of the scale. I cut it off here just so we could focus on the region of interest. So a monopoly would be

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10:28:54 1 10,000. If we had hundreds of firms selling each with a
10:28:57 2 really a small share, we'd be very close to zero. So
10:29:02 3 that's the range. Monopoly, as concentrated as you can
10:29:06 4 get, 10,000. Very unconcentrated, zero.

10:29:11 5 We've -- we place markets into three categories, as
10:29:15 6 shown here, that we generally call unconcentrated,
10:29:16 7 moderately concentrated or highly concentrated based on
10:29:21 8 this index. So that's how it's used. And below 1500 is
10:29:27 9 unconcentrated. 1500 is 2500 is moderately concentrated,
10:29:32 10 and then above that is highly concentrated. And generally
10:29:36 11 speaking, just maybe jump a head a little bit, we're
10:29:40 12 certainly concerned, as antitrust economists, when markets
10:29:45 13 become highly concentrated, that they are not going to be
10:29:47 14 as competitive. That's why we're doing all of this, okay,
10:29:50 15 to measure this. And we're also, then, in a merger
10:29:52 16 context, concerned that a merger will increase the
10:29:54 17 concentration. And that is generally linked, particularly
10:29:57 18 if it gets high, to a lessening of competition.

10:30:00 19 So, again, it's only one thing we do, but it's an
10:30:04 20 important part of the analysis of mergers. And beyond
10:30:07 21 mergers, when we look at markets, we classify them this
10:30:11 22 way. Whenever we're looking at markets, we can do this.
10:30:14 23 Q So let's use some examples to explain what's going
10:30:17 24 on. Can you explain to the jury what you're saying with
10:30:20 25 respect to 10 grocery stores?

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10:30:22 1 A So this is all just to get you comfortable with the
10:30:24 2 index so when we apply it in this case, it's
10:30:28 3 understandable. The example is if we had 10 grocery
10:30:32 4 stores in town, each with 10 percent share, when we
10:30:35 5 calculate this index, it would be 1000. And that's in the
10:30:40 6 unconcentrated range. So we would generally think if they
10:30:47 7 are 10 firms equally sized, we got a pretty competitive
10:30:51 8 situation. That's not generally worrisome.

10:30:53 9 Q So, again, staying with the grocery store example.
10:30:56 10 If you have ten grocery stores all competing in the same
10:30:58 11 market, how is competition going to affect the customers
10:31:01 12 who shop at those grocery stores?

10:31:04 13 A So behind -- thinking behind the metric is when
10:31:07 14 you've got ten of them, they are competing. They are
10:31:09 15 going to compete on price. They're going to compete on
10:31:11 16 store hours, service, freshest of food, you know, whether
10:31:14 17 the -- check-out time. You know, all the things we care
10:31:18 18 about. And when we think about competition, it's whatever
10:31:20 19 the customers want, the firms will be motivated to give it
10:31:24 20 to them in order to keep the business. So that's what's
10:31:27 21 in the background here.

10:31:28 22 Q All right. So, now, let's assume two of these stores
10:31:34 23 merge. So now there's nine stores, eight with 10 percent
10:31:39 24 and one with 20 percent. How does this index work with
10:31:47 25 respect to that merger?

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10:31:48 1 A So we now recalculate the index with this new set of
10:31:52 2 shares, and it goes up to 1200. So you might think two
10:31:56 3 supermarkets came under common ownership of the ten. So
10:32:00 4 what we look at, then, in general, as antitrust
10:32:03 5 economists, we look at two things: How high did it get,
10:32:06 6 the concentration, and how much did it go up?

10:32:09 7 And in this case, it didn't get all that high. It's
10:32:12 8 still only at 1200. Still unconcentrated. So we're
10:32:16 9 not -- we tend to think probably not a real issue about
10:32:20 10 this merger. It went up by 200, which is a moderate
10:32:25 11 amount, but it's still in the green zone. So we -- just
10:32:28 12 looking at this, we would tend to say it doesn't look like
10:32:32 13 a problem.

10:32:33 14 Q So, again, if you're thinking about it from the
10:32:35 15 customer's perspective and they now have nine choices of
10:32:39 16 grocery stores to go to, one a bit bigger than the other
10:32:42 17 eight, how does that affect competition between these nine
10:32:46 18 grocery stores?

10:32:47 19 A So the idea is there will still be a lot of reason
10:32:50 20 for those grocery stores to continue on compete on price,
10:32:52 21 quality, service, because there's still nine of them. And
10:32:57 22 we've refined the measure from nine to this metric. We're
10:33:01 23 expecting competition to continue to be pretty healthy, or
10:33:05 24 very healthy, in this zone.

10:33:07 25 Q All right. So now let's go to another example that

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10:33:09 1 you've had at least a little reference to before, which is
10:33:13 2 four cellular providers. Could you explain to the jury
10:33:16 3 what you're doing with this example?

10:33:18 4 A So this example is showing you how the index behaves
10:33:22 5 or how the numbers come out when you're going to go from
10:33:27 6 four to three. We did ten to nine was the one with the
10:33:31 7 grocery stores. So it's quite a different set of numbers
10:33:34 8 with four to three. This is not actually AT&T and
10:33:35 9 Verizon, as they're not all equal. So it's simplified.

10:33:39 10 But if you start with four, each with 25 percent, and
10:33:42 11 we can think of cell providers, the index would start at
10:33:47 12 2500. So it's right at the boundary there of becoming
10:33:49 13 highly concentrated. And then if they merge, two 25s to a
10:33:56 14 50, it gets up by quite a lot and well into the red zone
10:34:00 15 of highly concentrated.

10:34:03 16 So, again, we would look at the two things, how high
10:34:07 17 did the concentration get? In this case, we'd say, whoa,
10:34:11 18 3750. That's getting worrisome. And how much did it go
10:34:15 19 up? In this case, it went up by 1250. And that's a very
10:34:20 20 large amount. Okay. That's very substantial. So if I
10:34:24 21 were looking at a merger like that, the first thing you'd
10:34:28 22 say is, okay, this looks quite worrisome.

10:34:32 23 Now, again, there's more analysis to be done, but
10:34:34 24 this is a very important piece of it and a signal, if you
10:34:37 25 will, or an indication, strong indication, of whether

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10:34:39 1 there's going to be a problem with competition. And,
10:34:41 2 again, the idea would be with three providers instead of
10:34:46 3 two -- excuse me -- with three providers instead of four.
10:34:50 4 T-Mobile, for example, has been pretty much of a maverick
10:34:55 5 or aggressive in terms of pricing, maybe customers -- we
10:34:59 6 wouldn't get the benefit of that if they were acquired by
10:35:02 7 AT&T. That would be the idea; that that type of
10:35:04 8 competition would be less with only three. And that would
10:35:08 9 be the concern. And this metric would point in that
10:35:11 10 direction in that type of example.

10:35:13 11 Q And the way this HHI index works, you had said that
10:35:16 12 this increase of 1250 points is significant. What is the
10:35:22 13 benchmark that economists use when they are applying the
10:35:26 14 HHI index? What kind of an increase begins to raise alarm
10:35:31 15 bells?

10:35:32 16 A So 200 points, once you're in the red zone. So if
10:35:38 17 the merger -- if, after the merger, you end up in a highly
10:35:40 18 concentrated market and if it went up by 200 or more,
10:35:43 19 that's when we basically form an expectation, or
10:35:46 20 prediction, that the merger would be likely to
10:35:48 21 substantially lessen competition. And this example here
10:35:55 22 would certainly quantify because it's in the red zone and
10:35:58 23 a way more than 200-point increase.

10:36:01 24 Q So have you performed the HHI calculation for the
10:36:04 25 merger we're looking at, the acquisition of CMI by

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Jeld-Wen?

A It would be quite disappointing at this point if I had not.

Q All right. So let's go ahead and look at that.

Could you explain to the jury what they're looking at?

A So this is based on the market shares. I had already showed you the market shares of the three firms, 38, 16 and 46. CraftMaster being number three. And so the first thing is to calculate the index with those market shares before the merger, and that is 3820.

Q So what does this number, 3820, tell you about concentration and competition?

A Well, the -- it's well into the highly concentrated market zone. That's pretty much inevitable when you only have three firms. Okay. So we were already, before the merger, in a situation where we would be somewhat concerned about competition with just three. And the index is indicating that in a more detailed way with 3820.

Q All right. And so then the choices went from three to two. And so tell the jury what we're now showing here.

A So this is the Herfindahl-Hirschman Index after the merger with 54 and 46, with those shares. We calculate the index. It's just around 5000. And the increase is about 1200.

So remember I told you a monopoly is 10,000? If you

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10:37:43 1 have two equal size firms, it's 5000. And that's -- we're
10:37:46 2 pretty much at that. It's a little above that because
10:37:49 3 they are not quite equal. Okay. But we've got two firms
10:37:52 4 at the 5000. So this is just straightforward, I guess,
10:37:56 5 from the antitrust economist's point of view. Huge
10:38:01 6 increase in concentration. Very, very concentrated market
10:38:03 7 after the merger. So it's sending a strong signal, strong
10:38:08 8 indication, that the merger is likely to substantially
10:38:11 9 lessen competition.

10:38:13 10 I want to be very clear. We don't just look at the
10:38:16 11 numbers. We do a lot of other stuff, but it's an
10:38:17 12 important, as I keep saying, indication or signal. That's
10:38:22 13 how we use the numbers. It doesn't give the answer alone,
10:38:26 14 but it's quite informative, in my view.

10:38:29 15 Q All right. So based upon these HHI numbers, and the
10:38:32 16 business documents that you reviewed and everything that
10:38:34 17 you analyzed regarding the market conditions at the time
10:38:37 18 of the merger, what did you find at the end of step one of
10:38:43 19 your analysis?

10:38:46 20 A So we have a -- the conclusion is the expectation, or
10:38:52 21 the strong prediction, just looking at the information at
10:38:55 22 that moment, at that time that this merger would
10:38:59 23 substantially lessen competition. And it's really the
10:39:01 24 high -- big increase in concentration, like I said, that's
10:39:05 25 important. And also, we saw episodes of competition, even

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10:39:08 1 though there were only three firms. So the concern would
10:39:10 2 be the competition would be reduced after when there are
10:39:16 3 only two. So as of that moment, if you just view it at
10:39:21 4 that stage of the analysis, there's a strong prediction
10:39:23 5 that the merger would substantially lessen competition.

10:39:28 6 Q All right. So let's go to step two. Could you
10:39:30 7 remind the jury again what you're doing in step two of
10:39:34 8 your analysis?

10:39:35 9 A So now we're going to look at what happened after the
10:39:38 10 merger. Again, the merger was October 2012. For
10:39:42 11 essentially the five years after that, leading up to about
10:39:45 12 now, to see whether we have indications did the merger
10:39:48 13 substantially lessen competition or not? How would we
10:39:52 14 tell? What do we look at? That's what we're doing next.

10:39:55 15 Q All right. So let's go to this slide. What did you
10:39:58 16 look at to see if this merger hurt customers who bought
10:40:02 17 door skins?

10:40:02 18 A So the -- we want to translate substantially
10:40:08 19 lessening competition into something we can observe, to
10:40:11 20 test, whether it happened. We focus on impact on the
10:40:15 21 customers. Did the customers pay higher prices? Did they
10:40:19 22 have reduced access to the product? Was quality reduced?
10:40:23 23 Those are the sort of things we want to look at.

10:40:25 24 And here, that means focusing on the independent door
10:40:28 25 manufacturers because they are the ones who are buying the

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door skins and not making their own.

Q All right. So you mentioned to look at the customers. Are these the customers that you were talking about?

A Yes. I think -- hopefully, I think the jury is familiar with most, if not all of them. I would just flag that Steves, obviously, is the plaintiff in this case. My analysis is not just looking at Steves. It's looking at the market and the impact on the market. So I'm looking at the other customers as well, and they can give me a lot of information about what happened in the market. So it's not just Steves.

Q All right. And so what kind of things would an economist look for to evaluate whether a merger has lessened competition?

A Well, like I said, lessened competition sounds a bit abstract. But higher prices, that's real. Okay. And that's the primary concern that economists look at. If there's less competition, the firms -- the business won't compete as much for the business. They won't be forced to lower the price. We had that episode of price -- two episodes of pricing to get Steves' business. So we're concerned that the merger will cause the prices to be higher. That's one.

But the same idea would apply to other things that

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10:41:46 1 customers care about. A merger could reduce quality or
10:41:51 2 lead to service that's not as good.

10:41:54 3 Q And just so that we get this clear, how could a
10:42:00 4 merger result in higher prices?

10:42:03 5 A So -- well, let's just take the AT&T/T-Mobile
10:42:10 6 example. So you would at least worry -- that's not a
10:42:10 7 merger that happened. I'm just using that as an example,
10:42:16 8 right. That after that merger, AT&T could say, well, we
10:42:20 9 don't have to worry about T-Mobile competing with low
10:42:22 10 price plans or no contract or whatever, and so we won't
10:42:24 11 offer as good a deal just because they're not out there
10:42:27 12 independently competing. So they would offer higher
10:42:31 13 prices than they would otherwise have.

10:42:34 14 In other words, the merger led to higher prices than
10:42:36 15 AT&T would have been forced to offer after the merger.
10:42:40 16 And Verizon might think the same thing, by the way. They
10:42:43 17 might say, oh, T-Mobile has been bought by AT&T. We don't
10:42:48 18 have to compete so hard with them either.

10:42:51 19 So that would be one way that the remaining suppliers
10:42:53 20 would see a competitor is no longer in the picture. They
10:42:58 21 don't have to sharpen their pencil as much to offer a
10:43:02 22 lower price.

10:43:03 23 Q And how could a merger result in less quality or
10:43:07 24 service or other things that customers care about?

10:43:10 25 A It's the exact same idea. However companies compete,

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10:43:12 1 if they were competing on quality, let's say, in the
10:43:13 2 cellular service, how good the coverage is, they wouldn't
10:43:18 3 have to compete as much. So it's the same idea.
10:43:22 4 Competitor has been eliminated. They don't have to try as
10:43:25 5 hard. They are not motivated to try as hard or fight as
10:43:28 6 hard for customers. And that can show up on quality or
10:43:32 7 service side.

10:43:33 8 Q All right. So we're sitting here in which the
10:43:35 9 situation occurred five years ago, correct?

10:43:37 10 A That's right.

10:43:38 11 Q So what type of information or evidence would an
10:43:41 12 economist typically look at in that situation to determine
10:43:44 13 whether prices have gone up because of the merger?

10:43:47 14 A Well, we want to, in the first instance, track the
10:43:51 15 prices. Okay. Just see what happened over time. And
10:43:55 16 then see if they went up. And then if they went up, we
10:43:59 17 want to see, was there some reason for it not the merger
10:44:07 18 or was it because of the merger.

10:44:09 19 Q So, again, the same thing with quality. What would
10:44:11 20 an economist look to to assess whether quality went down
10:44:20 21 because of a merger?

10:44:21 22 A Well, again, since you have five years of experience,
10:44:21 23 you'd look at what happened to quality, and if quality
10:44:22 24 went down, you'd ask whether that was because of the
10:44:24 25 merger or some other reason.

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Q All right. And so you -- have you looked at whether the merger affected what happened to prices after the merger?

A Yes. That's been my main focus here in this phase.

Q And have you analyzed how the merger affected quality after the merger?

A No, I have not looked at quality.

Q And what should the jury look to to figure out whether quality was reduced after the merger?

MR. PFEIFFER: Objection, Your Honor. I don't believe this witness is appropriately situated to tell the jury who they should listen to.

MR. POMERANTZ: I'll rephrase the question, Your Honor.

THE COURT: All right.

Q What kind of evidence would be relevant to assess whether quality went down after the merger?

A Direct evidence on the quality, whether it changed, and if so, why.

Q Now, if, in fact, the loss of CraftMaster led to a decline in quality or service, what would that tell you about whether the merger has reduced competition?

A Well, if a merger causes a reduction in quality, because the firms don't have to -- are not competing as much on that dimension, that is a harm, and that would

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10:45:38 1 reflect a substantial lessening of competition.

10:45:41 2 I'm focusing on price because that's what I can
10:45:44 3 measure as an economist more accurately, but evidence
10:45:47 4 along any of these dimensions is relevant for the question
10:45:49 5 about impact of a merger on competition.

10:45:52 6 Q All right. So I'd like to now turn to price and look
10:45:55 7 at what happened to prices after the merger. What did you
10:46:00 8 look at to determine Jeld-Wen's price -- I'm sorry. Why
10:46:04 9 did you look at Jeld-Wen's prices?

10:46:06 10 A Well, we are going to focus first on Jeld-Wen prices
10:46:12 11 because that's what I have the most information about. So
10:46:15 12 naturally, we're going to want to see what were the prices
10:46:17 13 before the merger, what were the prices after the merger,
10:46:19 14 and we're going to track different customers. And then
10:46:23 15 we're going to see -- we're going to find they went up.
10:46:25 16 And so then we're going to look into how much and why.

10:46:29 17 Q So I take it, you just gave the jury the punch line
10:46:32 18 that Jeld-Wen's prices went up after the merger?

10:46:34 19 A Sometimes my timing is just not that good.

10:46:36 20 Q And how did you reach that conclusion that Jeld-Wen's
10:46:40 21 prices went up after the merger?

10:46:43 22 A So I have available to me quite a lot of detailed
10:46:48 23 information about Jeld-Wen's prices from price lists, from
10:46:51 24 sales data, from Jeld-Wen's own documents regarding how
10:46:57 25 they were setting prices, announcing prices and what their

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10:47:00 1 thinking was behind doing so.

10:47:02 2 Q All right. So let's go to some of those documents.

10:47:04 3 This is a document that the jury has seen earlier in this

10:47:06 4 case. Is this one of the documents that you relied upon

10:47:09 5 in your analysis?

10:47:11 6 A Yes. This is one page out of a deck, a Jeld-Wen

10:47:16 7 internal slide deck.

10:47:17 8 Q And why did you review and consider this particular

10:47:20 9 document?

10:47:21 10 A Well, this was in the category of Jeld-Wen looking

10:47:25 11 back at 2014, as it happens, and describing the price

10:47:32 12 increases that they had announced and implemented. So

10:47:35 13 it's directly relevant to my inquiry into what happened to

10:47:38 14 prices.

10:47:39 15 Q All right. Let's just pull up first the

10:47:41 16 noncontracted. We'll go to the contracted in a second.

10:47:43 17 And what did this document tell you about what happened to

10:47:47 18 prices to Jeld-Wen's noncontracted customers?

10:47:51 19 A So just to be clear again, these are Jeld-Wen's price

10:47:56 20 increases that are going to be effective in 2015 that were

10:48:01 21 announced in 2014. So that's what we're talking about.

10:48:04 22 And you can see they range of price increases, for the

10:48:10 23 noncontracted customers, as shown there in the upper box.

10:48:13 24 So they are implementing significant price increases at

10:48:16 25 that time.

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Q And what do you understand the term noncontracted customers to be referring to on this page?

A These are customers who do not have a long-term agreement with Jeld-Wen that gives them price protection. So they are exposed to a price increase. Put it differently, Jeld-Wen can increase their prices. It does not have a contractual obligation to keep the prices. So Jeld-Wen has more flexibility with these customers.

Q And what portion of Jeld-Wen's door skins prices are covered by these noncontracted customers?

A About 16 percent, I believe.

Q Did you say 16?

A Sixteen percent. So one in six. So most of their sales are to customers who have contracts. But we're focusing here first on the ones who do not have these contracts with price protection.

Q And in your analysis, why did you examine price changes for this particular portion of Jeld-Wen's customers?

A Right. So remember, we're -- after the merger, we're trying to see what happened to prices. These customers are the ones who -- where Jeld-Wen can increase the prices. These customers don't have contractual protections. So they are going to be the first place to look.

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10:49:32 1 The customers with contractual protections, Jeld-Wen
10:49:36 2 can't just increase the prices at least until --
10:49:39 3 willy-nilly, as it were, until the contract runs out. So
10:49:44 4 this is the natural first place to look why Jeld-Wen had
10:49:46 5 the ability to raise price without -- without breaching
10:49:49 6 the contract. We look there. And that's these customers.

10:49:54 7 Q So besides this one page that the jury sees here, did
10:49:58 8 you look for other evidence of what actually happened to
10:50:01 9 the prices charged to these noncontracted customers?

10:50:05 10 A Yes. Well, I have information on the actual price
10:50:08 11 lists that were applied, sales data and the like. So I
10:50:12 12 have other information. This is just an illustration of
10:50:17 13 how -- what they had announced and were planning -- were
10:50:21 14 implementing.

10:50:23 15 Q And did you analyze the price increases for all of
10:50:24 16 the noncontracted customers that are listed on this page?

10:50:28 17 A No. I did not look at -- I don't know how you say
10:50:33 18 the name. Boccam, Richelieu, Portes Veilleux. I speak no
10:50:45 19 French. Those are Canadian customers. So I focused on
10:51:00 20 the customers in the United States.

10:51:03 21 Q Now, in the bottom half of this page, there's a line
10:51:03 22 that says "Rebates Eliminated." Do you see that?

10:51:07 23 A I do.

10:51:07 24 Q What's a rebate?

10:51:07 25 A A rebate is when the customer pays a price, let's say

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10:51:07 1 \$5 for a door skin. And then later they get money back,
10:51:10 2 say \$1 a door skin. So the net price is \$4 in that case.
10:51:11 3 It's sort of a different timing for the way the money
10:51:11 4 goes. You pay 5 and then you get a dollar back later.

10:51:15 5 Q All right. Is that --

10:51:16 6 MR. PFEIFFER: Your Honor, may we approach?

10:51:18 7 THE COURT: All right.

10:51:19 8 (Discussion at sidebar as follows:)

10:51:37 9 THE COURT: Yes, sir.

10:51:38 10 MR. PFEIFFER: Your Honor, I'm concerned that
10:51:39 11 we're starting to get into territory where this witness is
10:51:43 12 interpreting a document that has not been interpreted --
10:51:45 13 not been authenticated.

10:51:47 14 THE COURT: Interpreting what document?

10:51:51 15 MR. PFEIFFER: He was just asked what the rebate
10:51:53 16 what, and he's going to talk about what it means in this
10:51:54 17 document.

10:51:54 18 THE COURT: Why can't he ask what a rebate is?

10:52:00 19 MR. PFEIFFER: And that's why I asked before he
10:52:00 20 asked the question. If he's going to get into what does
10:52:00 21 it mean when it says a rebate is eliminated, he's
10:52:03 22 interpreting this internal draft document.

10:52:08 23 THE COURT: This is the text of the document,
10:52:09 24 right?

10:52:11 25 MR. PFEIFFER: That's the text of the document,

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yes, Your Honor.

MR. POMERANTZ: I was going to ask him were rebates eliminated. And they can cross-examine him if they want to say their rebates weren't eliminated, but this slide says they were.

THE COURT: It's your own document. It says it was. Overruled. He can testify to that.

MR. PFEIFFER: Thank you, Your Honor.

(End of sidebar discussion.)

BY MR. POMERANTZ:

Q Professor Shapiro, did Jeld-Wen eliminate rebates after the merger?

A Yes, they did.

Q All right. So let's go first -- I'm going to look at some of these noncontracted customers. Let's start with Excel. What did your research show about what happened to Excel?

A So this slide depicts the significant price increases that Excel experienced in the purchases of door skins from Jeld-Wen in 2015, 20 percent. And then in 2016, another 6 percent on top of that.

Q All right. And how do you know that Excel's prices actually went up by 20 percent in 2015 and another 6 percent in 2015?

A Based on the price lists and the sales data and the

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other information available to me.

Q All right. And let's look at a couple of other noncontracted customers. These are customers buying door skins from Jeld-Wen but who didn't have contracts, correct?

A Yes. That's correct. Not a long-term agreement, I would say, with price protection is how I would put it.

Q Okay. Fair enough. Could you explain to the jury what happened to ABS?

A So they experienced price increases in 2015 and '17. You can see 12 percent between the two. And UniDoor experienced price increases in those three years, '15, '16 and '17, with 20 percent in total. This is what happened to the prices.

Q All right. So we've been looking at the noncontracted customers. Now let's turn to the contracted customers that are also reflected on this same page of Jeld-Wen's document. Who are contracted customers of Jeld-Wen?

A Well, you see the names here. What's distinguishing these customers from the others is that they all had long-term agreements with Jeld-Wen that specified how the prices would move over time. So Jeld-Wen could not just raise the price under the contract. The prices were specified according to different formulas.

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Q All right. And does that -- because these price increases are smaller, does that mean that the merger did not hurt competition?

A No. This is an important point. The prices that we see here -- these are much smaller increases in price, and they are basically governed by the contracts. Competition will arise when the contracts are up for renewal or possibly if a customer threatens to move, if they have the right under the contract, to move some of their business. But these -- we need to wait in time until the contracts expire, or other things happen, to see how competition -- a possible lessening of competition has affected the prices for these customers.

Steves, for example, had years of protection with prices moving, according to a formula, based on the competition that took place before the merger. We saw the competition there. So some of the impact on Steves will be later. And that's what we're seeing. That's why these price increases are small. They don't really tell us yet much about the question we're interested in because they are governed by the contracts.

Q All right. So I want to make sure that the jury understands what you just said.

A Me too.

Q Can you give the jury an example of how the existence

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1 of a contract may delay but not eliminate the effects of a
2 loss of choice?

3 A Okay. So the example here involves a contract in the
4 form of a lease for an apartment. So the idea here is --
5 it's just purely conceptual. Over time, you've agreed to
6 pay a certain rent under your lease. That's the green.
7 The lock there means the price is locked in for several
8 years.

9 If we imagine there's a merger that takes place,
10 let's say, between apartment owners while the lease is
11 running and maybe that reduces competition among the
12 apartment owners, the landlords, right. But right away,
13 your rent is not going to go up. You have a lease. Okay.

14 So the pattern we would expect would be when the
15 lease ends, then you might have to pay a lot more because
16 you don't have as many choices. Okay. But you wouldn't
17 expect to see the rent to go up right away because you've
18 got a lease and assuming the landlord abides by the lease.

19 Q And does the rent increase -- does it relate to the
20 merger in some way?

21 A Well, the example would be if that merger lessened
22 competition, we would expect rents would go up because the
23 landlords don't have to compete. It just won't happen
24 right away. That's the title of the slide, "Contracting
25 delay effects of a merger." So the effects, we would see

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10:58:03 1 them, but not for some -- maybe two years to go on your
10:58:03 2 lease. That's when you would be hurt by the lack of
10:58:07 3 choices about places to rent. Not right away after the
10:58:13 4 merger takes place.

10:58:14 5 Q So let's assume that the landlord is impatient. He
10:58:23 6 doesn't want to wait until the end of the lease to
10:58:25 7 increase price, increase your rent. Can the landlord
10:58:28 8 renegotiate early?

10:58:31 9 A Well, the landlord could come to you and try to get
10:58:34 10 you to pay higher rent now. But, of course, you're not
10:58:37 11 going to be very keen to do so. You say, I got a lease.
10:58:40 12 Why would you want to pay more?

10:58:42 13 Q And what would the landlord do if the landlord wanted
10:58:46 14 to try to get the tenant to pay more earlier?

10:58:51 15 A Well, there are a number of things that could happen.
10:58:53 16 In my example -- and you don't see this, really, I don't
10:58:55 17 think so much in landlords, but in business setting you
10:58:58 18 could say -- they could say, I'll tell you what. I want
10:59:02 19 you to pay more. You say, No thanks.

10:59:05 20 The landlord says, Well, if you don't pay more,
10:59:07 21 you're out of here when your lease is up. And you're
10:59:09 22 like, Well, I really don't want to move. That's not very
10:59:12 23 good. Landlord says, Tough luck. But I'll tell you what.
10:59:13 24 If you want to stay, I'll renew you, but only if you start
10:59:16 25 paying more now.

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10:59:17 1 Okay. So the landlord could bring some of that
10:59:21 2 pressure on you now by threatening to terminate your lease
10:59:25 3 and force you to move later, which you don't want to do
10:59:28 4 because there aren't very many choices. So we can have
10:59:31 5 this variation where you might agree to that. You might
10:59:36 6 say, All right. I don't like it, but I'll pay more now in
10:59:37 7 order to get my lease extended. And the landlord then
10:59:40 8 will extend the lease. That's what they are giving you in
10:59:42 9 exchange for you agreeing to pay more rent right now.
10:59:45 10 That could be a deal that you might agree to.

10:59:48 11 Q And let's take the example you're using here one step
10:59:51 12 further. Suppose that the merger ends up eliminating the
10:59:55 13 choice of all other apartment buildings. There's no other
10:59:59 14 apartment building that the tenant can turn to when the
11:00:02 15 lease expires. What -- how would that affect that
11:00:06 16 renegotiation of the lease that you were just talking
11:00:08 17 about?

11:00:09 18 A Well, it just gives the landlord that much more
11:00:12 19 bargaining leverage over you. If the landlord threatens
11:00:17 20 to terminate, your choices are poor. Let's imagine you
11:00:20 21 have to move pretty far away to get a decent place. That
11:00:24 22 landlord is in a stronger position, and you're more likely
11:00:27 23 to agree to something now in order to get the lease
11:00:29 24 extended.

11:00:30 25 Q All right. Did you look into the renegotiation

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11:00:34 1 efforts by Jeld-Wen of its long-term supply agreements?

11:00:36 2 A I did.

11:00:37 3 Q Which ones did you look into?

11:00:39 4 A Looked at Lynden and Steves --

11:00:43 5 Q And did Jeld-Wen --

11:00:43 6 A -- in particular.

11:00:44 7 Q I'm sorry. I didn't mean to interrupt.

11:00:47 8 A Go ahead.

11:00:47 9 Q Did Jeld-Wen demand a price increase during these

11:00:50 10 renegotiations?

11:00:55 11 A I don't like to use the word "demand." I would say

11:00:58 12 Jeld-Wen said that that would be -- they wanted a price

11:01:03 13 increase or they would terminate.

11:01:05 14 Q All right. So let's look at what Jeld-Wen said.

11:01:06 15 This is Mr. Hachigian, and the jury saw his deposition

11:01:20 16 testimony yesterday, some portions of it. And this is one

11:01:24 17 portion of his testimony that they heard yesterday. Was

11:01:25 18 this testimony and this conduct relevant to your analysis?

11:01:27 19 A Yes. It's just the pattern I've been describing;

11:01:32 20 that he would add this 46 cents per door skin charge in

11:01:42 21 order to -- if you wanted your contract renewed, you'd

11:01:48 22 have to pay that extra amount, basically.

11:01:51 23 Q And this is other testimony that the jury heard

11:01:53 24 yesterday from Mr. Hachigian. Is this also something that

11:01:58 25 you relied upon?

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11:01:59 1 A Yes. That's right.

11:02:00 2 Q So let's look --

11:02:02 3 THE COURT: Were you in the courtroom listening
11:02:03 4 to the testimony?

11:02:04 5 THE WITNESS: I was, Your Honor.

11:02:05 6 THE COURT: The whole trial?

11:02:06 7 THE WITNESS: No, sir.

11:02:07 8 THE COURT: But just Hachigian's?

11:02:09 9 THE WITNESS: Yes. Yesterday afternoon, I was
11:02:11 10 here. I managed to avoid the technical problems, and I
11:02:15 11 came for the last hour. So --

11:02:18 12 THE COURT: I wish I would have known your
11:02:25 13 secret.

11:02:26 14 Q So let's first start with Lynden. What happened when
11:02:29 15 Jeld-Wen wanted to renegotiate its contract with Lynden?

11:02:35 16 A Well, we've heard Mr. Hachigian's approach to this.
11:02:38 17 The result was that Lynden did agree to the price
11:02:42 18 increase, which was -- this was in 2016, which was
11:02:47 19 7 percent. And their contract was renegotiated. That was
11:02:54 20 the deal. They agreed to that.

11:02:56 21 Q And how does this price increase relate to your
11:02:59 22 opinion about the loss of CMI as a choice in the market?

11:03:05 23 A Well, Lynden was in a situation where they could not
11:03:12 24 turn to CMI anymore as a possible alternative when -- when
11:03:17 25 Jeld-Wen asked -- asked for a higher price. So they

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11:03:22 1 were -- had reduced bargaining leverage as a result of the
11:03:27 2 less fewer choices.

11:03:28 3 Q All right. So now let's look at what happened when
11:03:31 4 Jeld-Wen came to Steves. Did Jeld-Wen attempt to raise
11:03:34 5 the price it was charging to Steves during the term of the
11:03:36 6 long-term supply agreement?

11:03:38 7 A Yes, they did.

11:03:39 8 Q All right. So let's talk about what happened here.
11:03:42 9 What is this -- how does this document relate to your
11:03:45 10 analysis and opinions?

11:03:46 11 A So this all happened in 2014, the episode we're
11:03:49 12 talking about now, where Mr. Hachigian communicated to Sam
11:03:54 13 and Edward Steves the -- that he wanted them to pay this
11:03:59 14 additional charge, which was 46 cents per door skin.
11:04:03 15 That's what he tells them.

11:04:06 16 Q Okay. And from an economist standpoint, is that 46
11:04:09 17 cents a price increase?

11:04:12 18 A Of course. Yes.

11:04:14 19 Q All right. And so did Steves agree to pay 46 cents
11:04:19 20 more per skin?

11:04:20 21 A They did not.

11:04:21 22 Q And what happened?

11:04:23 23 A So then Jeld-Wen terminated -- well, sent them the
11:04:28 24 notice of termination. This is in September 2014. And
11:04:36 25 since their long-term agreement provides a seven-year

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11:04:40 1 period during which the supply will continue, that's why
11:04:43 2 we're talking about September 2021 here. But Steves was
11:04:50 3 sent the notice of termination.

11:04:52 4 Q So let's go back to your lease example. And we've
11:04:55 5 added one more portion to this chart, and that's that line
11:05:00 6 between merger and end of lease with a question mark.
11:05:04 7 What does that line and question mark represent?

11:05:07 8 A Well, we're -- if you see the title here to the
11:05:11 9 slide, "Contract provides limited protection." One of the
11:05:15 10 problems that -- in my example, the tenant would
11:05:18 11 experience, if there's no good choices of other apartments
11:05:22 12 to rent, even though you've got a lease, the landlord
11:05:25 13 would probably know -- suppose the landlord would realize
11:05:29 14 you don't have very good choices. It's not the situation
11:05:32 15 that the landlord is necessarily going to go out of his
11:05:35 16 way to help you if something goes wrong. So the dynamic
11:05:39 17 can change.

11:05:40 18 Q All right. So do you believe that there's -- is it
11:05:43 19 your view, and your analysis, that there's any way that
11:05:45 20 the reduction in competition caused by the CMI merger
11:05:49 21 could affect the contracted customers before the
11:05:53 22 expiration of their long-term supply agreement?

11:05:57 23 A Well, we have two effects that we can look for on the
11:06:04 24 contracted customers. One we've talked about, such as
11:06:05 25 Lynden paid a higher price in order to get the contract

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11:06:08 1 extended and not be terminated. So we have that. And
11:06:11 2 then we can have other things where the contract may be
11:06:14 3 not completely clear. There's a dispute about it.
11:06:17 4 There's a leak in the ceiling, and does the landlord come
11:06:22 5 very quickly to fix it? Not necessarily so clear.

11:06:24 6 If you have that sort of thing, when I said the
11:06:26 7 dynamic can change, the customer, the tenant, or in this
11:06:31 8 case Steves, could be hurt during the contract by the loss
11:06:36 9 of options and choice of moving their business elsewhere.

11:06:39 10 Q All right. So the jury has heard a lot of testimony
11:06:42 11 already about something called the key input costs and
11:06:45 12 whether Jeld-Wen was supposed to increase or decrease its
11:06:49 13 prices when the key inputs changed. Does that relate to
11:06:54 14 the point you're making with this slide?

11:06:58 15 A Yes. I think so. So it seems to be where there's a
11:07:09 16 dispute changes, and the dynamics in such disputes changes
11:07:10 17 when the market is less competitive in favor of the
11:07:14 18 seller. It's a general idea.

11:07:15 19 Q And so if CMI was still out there as an option for
11:07:18 20 Steves, do you think that could have affected what
11:07:19 21 happened with these key input cost calculations?

11:07:23 22 A I'll say could. Okay. I'm just making the general
11:07:25 23 economic point that when the seller doesn't have as much
11:07:30 24 competition to face, they are less likely to go out of
11:07:34 25 their way to help, or they might take a tougher stance

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11:07:38 1 when there are ambiguities in the contract or other
11:07:41 2 day-to-day business issues.

11:07:42 3 Q All right. So let's go to another example of what
11:07:45 4 happened between Steves and Jeld-Wen under the contract
11:07:49 5 during the time after it was -- notice of termination was
11:07:54 6 sent. Could you explain to the jury what this slide is
11:07:57 7 showing?

11:07:58 8 A So this is Madison and Monroe pricing. The Madison
11:08:03 9 and Monroe were two models that Jeld-Wen introduced after
11:08:09 10 the merger that are in the general category of
11:08:15 11 Craftsman-type style doors. And Jeld-Wen charged
11:08:22 12 significantly higher prices for these newer models than
11:08:25 13 they had been charging Steves under their long-term
11:08:29 14 agreement for Craftsman door skins. And the slide here
11:08:38 15 shows how much higher the prices that Jeld-Wen charged to
11:08:43 16 Steves were, 17 to 21 percent higher for the Madison, and
11:08:47 17 essentially two to three times as much for the Monroe, in
11:08:51 18 comparison with the Craftsman door skins that were priced
11:08:55 19 in their long-term agreement.

11:08:56 20 Q All right. So how does Jeld-Wen's pricing of the
11:09:00 21 Madison and Monroe door skins affect your opinions in this
11:09:03 22 case?

11:09:05 23 A So this I see as an example of how Jeld-Wen set its
11:09:12 24 prices when it did not believe it was constrained by a
11:09:16 25 long-term agreement. In this case, although it's Steves

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11:09:20 1 who has a long-term agreement, Jeld-Wen's position, as I
11:09:23 2 understand it, is that that -- they had the right, under
11:09:26 3 that agreement, to set -- to set these prices and did not
11:09:29 4 have to set the same price as the earlier Craftsman doors.
11:09:33 5 So this is an indication, much like the noncontracted
11:09:38 6 customers, about how Jeld-Wen saw its pricing power after
11:09:43 7 the merger when not constrained by a long-term agreement.

11:09:47 8 THE COURT: Are you saying -- what you said
11:09:49 9 earlier, that you think the pricing on the Madison and
11:09:57 10 Monroe doors is an example of using some contract issue
11:10:05 11 to -- as a springboard to claim higher prices?

11:10:10 12 THE WITNESS: I didn't mean that, Your Honor.

11:10:12 13 THE COURT: All right. Thank you.

11:10:16 14 Q All right. So you --

11:10:18 15 THE WITNESS: I'm sorry. Let me -- I want to
11:10:19 16 make sure it's clear.

11:10:21 17 THE COURT: You gave an example earlier -- I'm
11:10:24 18 sorry, I may have misunderstood you -- about service and
11:10:28 19 quality changes and the input costs and so forth. And
11:10:32 20 that was because of some alleged ambiguity -- or provision
11:10:38 21 in the contract. And I'm asking you whether you are also
11:10:41 22 saying, because of the lead-in to the question, that there
11:10:44 23 was the use of some kind of contract term, dispute over a
11:10:49 24 contract term, to get higher prices for the -- charge
11:10:52 25 higher prices for the Madison and Monroe? Are you saying

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that or not?

THE WITNESS: I'm saying that if it was agreed by Jeld-Wen and Steves that the Madison and Monroe were covered by the long-term agreement at the prices specified for Craftsman doors, they just wouldn't have been able to do this price increase. Jeld-Wen, as I understand it, does not believe that these doors are covered by the agreement. And so it is informative regarding their pricing when not constrained by an agreement.

THE COURT: I see. Okay.

Q Professor Shapiro, you've just gone through, the last 15 minutes or so, showing various ways that Jeld-Wen raised their prices after the merger, correct?

A Yes.

Q And have you reviewed Professor Snyder's analysis of what happened to Jeld-Wen's prices after the merger?

A I have.

Q And sort of bottom line, how has -- how has Professor Snyder's analysis affected your conclusion regarding Jeld-Wen's prices?

A Professor Snyder also finds that door skin prices went up after the merger. He found them going up about 11 percent over a period of time from 2012 into 2016.

So we agree they went up. We disagree about how to measure it. But we do agree on that point.

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Q All right.

MR. POMERANTZ: Your Honor, I'm about to turn the page to a new subject, and I didn't know if you wanted to take --

THE COURT: I think we'll take the morning recess at this time, 20 minutes, before we move into the next thing. Be seated while the jury is being excused. Just take your pads with you.

(The jury exited the courtroom.)

THE COURT: All right. We'll take a 20-minute recess.

MR. POMERANTZ: Thank you, Your Honor.

(Recess taken.)

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11:38:16AM 1 THE COURT: All right, Mr. Pomerantz.

11:38:20AM 2 MR. POMERANTZ: Thank you, Your Honor.

11:38:22AM 3 Q Just to reset where we are, we just went through showing
11:38:25AM 4 that Jeld-Wen's prices went up -- for door skins went up after
11:38:30AM 5 the merger; correct?

11:38:30AM 6 A Yes.

11:38:31AM 7 Q So I want to now turn to what caused those prices to go
11:38:35AM 8 up. Professor Shapiro, as an expert in antitrust economics,
11:38:40AM 9 were Jeld-Wen price increases caused by the merger?

11:38:44AM 10 A I believe they were, although that requires some
11:38:47AM 11 additional checking at this point in the analysis.

11:38:49AM 12 Q So what did you do to reach the conclusion that it was the
11:38:53AM 13 merger that caused Jeld-Wen's prices to go up?

11:38:56AM 14 A So I would set the stage, we had the big increase in
11:39:04AM 15 concentration with the Herfindahl index, the HHI. We do see
11:39:06AM 16 these price increases, and now -- but there are other things to
11:39:10AM 17 check because, of course, prices can go up for other reasons,
11:39:14AM 18 and so the main things to check were -- that economists would
11:39:18AM 19 look at would be did costs go up. That could cause prices to
11:39:23AM 20 go up even if there was competitive market -- even in a
11:39:25AM 21 competitive market, or what about increased demand.

11:39:28AM 22 Those would be the possible alternative explanations that
11:39:33AM 23 I wanted to look into to see if they would explain the price
11:39:38AM 24 increase, and, if not, then what it looks like at this point,
11:39:42AM 25 which is the merger is the cause, would be confirmed.

11:39:46AM 1 Q All right. So did you do analysis and study, studying to
11:39:50AM 2 determine whether either of these alternative explanations
11:39:54AM 3 would explain why prices went up?

11:39:55AM 4 A I looked at both of them, yes.

11:39:57AM 5 Q And we'll get to your analysis, but bottom line
11:40:00AM 6 conclusion, what did you find at the end of your analysis?

11:40:03AM 7 A I found that neither of these explanations actually --
11:40:08AM 8 neither of these possibilities, in fact, explains the price
11:40:12AM 9 increases for the door skins that were observed starting in
11:40:17AM 10 2012 and going into 2016/'17 -- sorry, since the merger.

11:40:22AM 11 Q Just so we get the time period, what data did you have
11:40:25AM 12 available to you, during what time period, in order to assess
11:40:28AM 13 the issues that are raised here on this slide?

11:40:31AM 14 A Well, it's a bit different for the two, but I had quite a
11:40:37AM 15 lot of data eventually on Jeld-Wen's costs. It took some time
11:40:41AM 16 for that to come, so that was in the later reports, but a lot
11:40:44AM 17 of data on Jeld-Wen's costs to see whether they went up or not.
11:40:48AM 18 That's what we're going to look at. And then also data on
11:40:53AM 19 demand in the form of housing starts and total amount of doors
11:40:58AM 20 and door skins. That data goes back even earlier in time, and
11:41:03AM 21 some of that is public data, but those are the two main sets of
11:41:06AM 22 data we'll be looking at.

11:41:08AM 23 Q All right, so let's start with costs and whether that
11:41:10AM 24 could explain why Jeld-Wen's prices for door skins went up.
11:41:14AM 25 What did you -- did Jeld-Wen's costs increase or decrease after

11:41:19AM 1 the merger?

11:41:20AM 2 A You can see the title here, they, in fact, decreased, and
11:41:25AM 3 we have two different ways of measuring costs that I was able
11:41:29AM 4 to perform. See those key input costs and manufacturing costs
11:41:35AM 5 per door skin? Each of the measures went down from 2012 to
11:41:41AM 6 2016, and I think that's what we're about to show on the slide.

11:41:43AM 7 Q Before we get to what actually happened, I just want to
11:41:46AM 8 make sure the jury understands these two different measures of
11:41:49AM 9 costs.

11:41:50AM 10 What's the difference between key input costs, which you
11:41:55AM 11 have in the left-hand column, and manufacturing costs per door
11:41:58AM 12 skin, for each door skin that you have on the right-hand side?

11:42:02AM 13 A Okay, so let me just explain what each one is. Each one
11:42:06AM 14 has its sort of pros and cons. This key input costs are a
11:42:12AM 15 specific measure of raw materials and energy costs that
11:42:18AM 16 Jeld-Wen and Steves agreed to track over time, and the prices
11:42:24AM 17 in their long-term agreement that Jeld-Wen would charge to
11:42:27AM 18 Steves would move up or down over time based on those costs.

11:42:33AM 19 It's wood, resin, energy, electricity, and so forth. So
11:42:40AM 20 that's specific input costs. The advantage of that measure is
11:42:45AM 21 the company's actually used it, it's very specific, and they've
11:42:49AM 22 used it in their own business dealings to determine how price
11:42:52AM 23 would move over time. So that's key input costs.

11:42:56AM 24 Q And then what is manufacturing costs per door skin? How
11:42:58AM 25 does that differ from key input costs?

1 A So key input costs, for example, doesn't include labor,
2 okay. So that's an important cost. So it's not as complete.
3 So I measured the Jeld-Wen costs again over time using what
4 economists call average variable costs, but we've described for
5 the label as manufacturing costs per door skin, and this is the
6 standard way in which economists would look at costs for this
7 purpose.

8 So this includes a broader group of costs, including labor
9 and other items that Jeld-Wen tracks as variable costs. What
10 variable means is, when you make more door skins, production
11 goes up, how much do your costs go up.

12 So some costs are fixed. They just -- you're going to
13 bear those costs whether you are making an extra million door
14 skins or not. Other costs are variable, and I'm tracking the
15 variable ones, which is the basis on which prices are marked up
16 from the variable costs in a competitive market. And so that's
17 what we're tracking over time, those variable costs using the
18 Jeld-Wen cost data.

19 Q So if I understand what you said, the manufacturing costs
20 per door skin includes some additional costs beyond the key
21 input costs; correct?

22 A Yes, quite a few. The substantial majority of Jeld-Wen's
23 costs are included in this concept of manufacturing costs per
24 door skin, all the ones that are variable that increase when
25 production increases over these periods of time.

1 Q So the costs would not -- Jeld-Wen's costs that would not
2 be included in the right-hand column would be those costs that
3 don't change because you manufacture additional door skins;
4 right?

5 A That's right, and economists would call those fixed costs,
6 and I'm not including those in this measure.

7 Q So, for example, Mr. Hachigian's salary, he gets paid that
8 same amount whether they manufacture the next door skin or not.
9 That would not be included in the manufacturing costs per door
10 skin; correct?

11 A That's correct.

12 Q So let's look at what you actually then learned about
13 Jeld-Wen's costs. First, let's go to the key input costs.
14 Could you tell the jury what you found after looking at
15 Jeld-Wen's data.

16 A Yes. So I have data year by year of this input cost
17 measure. There's a particular formula that the company used.
18 I applied that, and from 2012 to 2016, I measured that this
19 measure went down by between 13 and 15 percent. There is some
20 details about how you measure certain things. That's why
21 there's a range.

22 Q And what did you find about what happened to manufacturing
23 costs per door skin?

24 A This also went down a significant amount from 2012 to
25 2016. The decline was 7.9 percent.

11:45:53AM 1 Q So no matter which way you look at it, were your findings
11:45:58AM 2 that costs decreased, not increased?

11:46:01AM 3 A That's correct.

11:46:02AM 4 Q Did Jeld-Wen pass these cost savings on to its door skin
11:46:08AM 5 customers?

11:46:08AM 6 A Well, we saw -- we had just seen before the break that the
11:46:14AM 7 door skin prices went up, and so the answer is no in that
11:46:18AM 8 sense, they did not lower the prices even though their costs
11:46:21AM 9 went down.

11:46:22AM 10 Q Now, you said that Professor Snyder has also written
11:46:26AM 11 reports and given opinions in this case; correct?

11:46:28AM 12 A Yes.

11:46:28AM 13 Q Are you aware that Professor Snyder claims that Jeld-Wen's
11:46:32AM 14 input costs have increased, not decreased, since the merger?

11:46:36AM 15 A I am aware of that.

11:46:37AM 16 Q Can you explain why your conclusion on what happened to
11:46:40AM 17 costs is different from Professor Snyder's?

11:46:43AM 18 A Yes, sure. The main differences that -- I looked actually
11:46:48AM 19 at Jeld-Wen's costs, the two measures we've talked about, and
11:46:51AM 20 he did not look at their costs. He looked at an index having
11:46:55AM 21 to do with wood that is not nearly as accurate for measuring
11:47:01AM 22 Jeld-Wen's costs.

11:47:02AM 23 Q So when you say he looked at an index, does that mean that
11:47:05AM 24 he wasn't looking at Jeld-Wen's costs but rather some
11:47:08AM 25 industry-wide cost information?

11:47:10AM 1 A As I recall it, he was looking at a published index. The
11:47:17AM 2 government publishes all sorts of indexes about how much did
11:47:21AM 3 car prices go up, how much did wood prices go up, and they have
11:47:24AM 4 a lot of these. They are called producer price index. You've
11:47:24AM 5 probably heard of consumer price index. There's producer price
11:47:29AM 6 index, too, and he looked at something in those categories as
11:47:31AM 7 best I can remember sitting here right now.

11:47:33AM 8 Q If you're trying to figure out why Jeld-Wen's prices for
11:47:38AM 9 door skins went up, why do you think it's better to look at
11:47:41AM 10 Jeld-Wen's actual costs rather than some producer price index?

11:47:45AM 11 A It's just much more accurate and inclusive. That is, the
11:47:52AM 12 index he looked at doesn't include a range of costs, and we're
11:47:56AM 13 not even sure that that's the inputs that Jeld-Wen used, and,
11:48:01AM 14 in any event, this is just their actual costs we looked at, and
11:48:05AM 15 he did not look at their actual costs.

11:48:07AM 16 Q So do the costs that you are measuring here, do they
11:48:12AM 17 include the costs, let's say, of building or buying a door skin
11:48:17AM 18 factory?

11:48:19AM 19 A No, they do not include that fixed cost.

11:48:21AM 20 Q And why do you not include those fixed costs?

11:48:26AM 21 A So, as I said, the way that prices are set in competitive
11:48:34AM 22 markets is that firms compete, and this average variable cost
11:48:41AM 23 is what's going to govern the prices or closely related measure
11:48:46AM 24 called marginal cost, and so in looking over time at how prices
11:48:53AM 25 changed, the correct measure to look at for costs is this

11:48:57AM 1 average variable cost. That's the advantage of that cost
11:48:59AM 2 measure. It's economically the right one to look at. The
11:49:03AM 3 advantage of the key input costs is the company has used it in
11:49:06AM 4 practice to govern price changes, so it's certainly important,
11:49:10AM 5 too.

11:49:11AM 6 The capital costs you've asked about, it's natural to
11:49:13AM 7 think, of course -- they got to get a return on their capital;
11:49:18AM 8 otherwise, they can't stay in business. So that happens when
11:49:23AM 9 its competitive conditions permit, the companies get a margin
11:49:26AM 10 over their variable costs -- a margin just means the price is
11:49:30AM 11 above the variable cost -- and that difference, that margin, is
11:49:36AM 12 what gives a return on the capital investment and provides
11:49:39AM 13 funds to make next year's investment as needed.

11:49:43AM 14 So that's the way things work in competitive markets, and,
11:49:46AM 15 in fact, Jeld-Wen got a good healthy margin above variable
11:49:51AM 16 costs. What we're tracking now is the change in the costs,
11:49:56AM 17 because we're interested in the change in the prices over time
11:49:58AM 18 after the merger, and this is the correct measure to track
11:50:02AM 19 those changes.

11:50:03AM 20 Q All right, so let's make sure the jury follows what you
11:50:06AM 21 just said. The jury knows that Jeld-Wen built a door skin
11:50:12AM 22 plant called Dodson in Dodson, Louisiana. You are aware of
11:50:17AM 23 that as well; correct?

11:50:18AM 24 A I am.

11:50:19AM 25 Q The jury knows that Jeld-Wen brought a door skin plant

11:50:23AM 1 when it bought CMI. It bought the Towanda plant?

11:50:27AM 2 A I am.

11:50:28AM 3 Q How does Jeld-Wen pay for building Dodson and buying CMI?

11:50:33AM 4 A Right. So let's start, when you build a plant, there are
11:50:37AM 5 a number of ways a company gets a return on that. For one
11:50:40AM 6 thing, if it's more efficient than the other plants -- maybe
11:50:44AM 7 you have older plants -- you have lower variable costs. Your
11:50:48AM 8 costs go down to operate it, and that gives you more of a
11:50:50AM 9 margin, and that's a reason, of course, you might retire an old
11:50:53AM 10 plant and build new one.

11:50:55AM 11 Another aspect is when you price in a competitive
11:50:59AM 12 situation, you hope to get a good margin above the variable
11:51:03AM 13 costs, sometimes called operating income -- they're different
11:51:06AM 14 concepts that businesses use -- and that will give you return
11:51:09AM 15 on capital.

11:51:10AM 16 It all depends on the competitive situation, though.
11:51:14AM 17 There's no guarantee it's in a competitive market. If you
11:51:17AM 18 build a facility and it's in the wrong place or it wasn't
11:51:19AM 19 designed well or you operate it poorly, you won't get a very
11:51:23AM 20 good return. There's no guarantee. The price is going to be
11:51:26AM 21 set by what you can get in the market.

11:51:28AM 22 But if you're reasonably efficient and planning ahead
11:51:32AM 23 well, you will have a margin price over average variable costs,
11:51:36AM 24 and over the period -- which the facility is operating, if
11:51:40AM 25 demand is good enough, those margins will give you the return

1 and pay the debt or whatever other costs there were that you
2 incurred in order to build the facility.

3 That's the way it all fits together, and the fact that a
4 company wants to get a higher return on its capital doesn't
5 mean it can if the competition doesn't allow it.

6 Q So do you know if Jeld-Wen made a profit or a margin over
7 its per-unit manufacturing costs in 2012, the year it bought
8 CMI?

9 A Yes, I was able to calculate that margin, and it was
10 around 35 percent. So that's what I was talking about. You
11 can think of that as a margin that gives them a return on the
12 investments they had made to be able to make the door skins and
13 can fund future investment if it's thought to be profitable
14 going forward. They did earn a significant margin.

15 Q So you said that margin was 35 percent back in 2012;
16 correct?

17 A I did, yes.

18 Q Has Jeld-Wen's margins for door skins changed since 2012?

19 A Well, yes. It's gone up because the price went up, as
20 we've talked about, and the costs went down as we've just been
21 demonstrating, so that widens the gap, the margin. So the
22 margin has become higher.

23 Q And were there documents produced in this case that
24 explain to you why Jeld-Wen -- how this margin analysis you are
25 talking about affected what Jeld-Wen was doing?

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1 A Well, you are showing here the capital charge, and I did
2 hear Mr. Hachigian yesterday -- this is an email to him --
3 about this capital charge, the additional price per door skin
4 around \$0.46 or so that Jeld-Wen was seeking.

5 What this email shows is that that additional charge was,
6 from Jeld-Wen's perspective, a way they were hoping, expecting,
7 planning to get a return on the \$220 million that they had
8 invested, roughly \$80 million to purchase CraftMaster and
9 \$140 million to build the Dodson plant, 220 million together.

10 So they had put that money out, they had made those
11 investments, and he was looking for a way to get the return,
12 and higher door skins prices was what -- one route, at least,
13 that we're talking about here to get that return.

14 Q So are these the kind of costs that would explain a change
15 in the price of door skins?

16 A Well, not if there's competition working. If you have a
17 merger, a company buys its competitor -- so as I've said all
18 along, as an antitrust economist, we look and say, all right,
19 did that lessened competition lead to higher prices. If the
20 company then says, well, now we want our customers to pay a
21 higher price to fund the fact that we bought our competitor,
22 that's a higher price, and it's not based on a cost increase.
23 So that's quite unjustified and reflects the lessening of
24 competition, the greater pricing power that the firm has as a
25 result of the acquisition.

11:55:01AM 1 Q So these are the costs that you think matter to setting --
11:55:06AM 2 to Jeld-Wen setting prices; correct?

11:55:09AM 3 A For how prices change over time, yes, the variable costs.

11:55:14AM 4 Q And these costs went down, not up; correct?

11:55:16AM 5 A Yes, sir.

11:55:17AM 6 Q All right. So what does that tell you about whether
11:55:21AM 7 increased costs explain Jeld-Wen raising its price after the
11:55:26AM 8 merger in 2012?

11:55:27AM 9 A So I've ruled that out. Remember, the whole path we're on
11:55:31AM 10 is we saw the merger increase concentration, higher prices. I
11:55:35AM 11 wanted to check whether there was some other reason why the
11:55:38AM 12 price went up.

11:55:38AM 13 We've now ruled out increased costs as a reason, so we
11:55:41AM 14 have one more to consider before we would fairly conclude -- I
11:55:46AM 15 would fairly conclude that the merger is the cause of the price
11:55:50AM 16 increase.

11:55:50AM 17 Q So let's look at increased demand and whether that
11:55:53AM 18 explains why Jeld-Wen raised its door skin prices. Could you
11:55:59AM 19 tell the jury, has demand for door skins increased since the
11:56:02AM 20 merger?

11:56:03AM 21 A Yes. So this is why this is worthy of looking into,
11:56:07AM 22 because demand has gone up. What we're showing you here is
11:56:12AM 23 housing starts, okay? So that's the industry term for how many
11:56:17AM 24 new houses were -- constructions were started, and it's year by
11:56:21AM 25 year, and you can see here the dip for the great recession. It

11:56:27AM 1 was very high in 2005 -- that was a peak -- and then hit the
11:56:32AM 2 low point in 2009 when things were really rough and has come
11:56:37AM 3 back modestly since then.

11:56:39AM 4 So we're focusing on the period from 2012 up to '15, or
11:56:43AM 5 you can see 2016. So there's been a modest recovery over that
11:56:48AM 6 period of time, and since there are more housing starts, that
11:56:51AM 7 means more demand for doors and more demand for door skins. So
11:56:56AM 8 there was an increase in demand over this period of time.

11:56:59AM 9 That's why I need to check, would that explain the
11:57:03AM 10 increased price in door skins. So maybe it's not the merger.
11:57:07AM 11 Maybe it's the increase in demand. That's what we're looking
11:57:10AM 12 into.

11:57:10AM 13 Q So stepping back from door skins for a second, could an
11:57:13AM 14 increase in demand for a product explain higher prices for that
11:57:16AM 15 product?

11:57:17AM 16 A Of course it can, right. Just supply and demand tells you
11:57:21AM 17 sometimes demand goes up, the price goes up. Of course, it
11:57:24AM 18 can -- that's why I'm looking into this -- but it doesn't have
11:57:27AM 19 to.

11:57:28AM 20 Q Are there specific scenarios, specific situations in which
11:57:32AM 21 an increase in demand could lead to an increase in price?

11:57:35AM 22 A Right. So certainly, as an economist, there are really --
11:57:41AM 23 if you think about it, as we economists have thought about it,
11:57:44AM 24 there are two reasons why an increased demand tends -- can
11:57:49AM 25 cause price to go up, often does.

1 One is the variable costs go up, the more demand --
2 there's a lot of demand for computer programmers, so there's
3 only so many of them and their wages go up, okay. So that
4 could happen. Therefore, the companies that hire them, their
5 costs go up.

6 So the variable costs could go up, or you could just get
7 tight on capacity. If you are running out of capacity, then
8 prices are going to go up. So those are really the two
9 possibilities, the ways in which demand can pull up price that
10 we need to consider here.

11 Q All right. So, in this particular instance -- now let's
12 go back to door skins -- did the increase in demand for door
13 skins cause an increase in costs?

14 A No. We've already checked that part actually, because we
15 looked at the costs. It's a little bit surprising. You might
16 think we had this period where the economy was recovering,
17 there were more houses being built, and yet these key input
18 costs went down; right?

19 We have a period where the variable costs went down. So
20 that explanation is not going to do it. Wasn't demand, they
21 had made more for the inputs. We already checked that out.

22 Q Okay, so, I'm sorry, go ahead. I was going to go to
23 the second --

24 A So we need to -- me, too. So we're going to check -- what
25 about getting tight on capacity.

11:59:16AM 1 Q So you've ruled out that an increase in costs related to
11:59:20AM 2 demand might cause prices to go up. So the other explanation
11:59:24AM 3 you mentioned was capacity and whether there was a shortage of
11:59:28AM 4 capacity. Why does capacity matter?

11:59:31AM 5 A So if the supplies get tight and demand keeps going up,
11:59:37AM 6 that is going to raise price. Essentially the customers are
11:59:41AM 7 bidding for the limited amount of supply that's available.
11:59:44AM 8 That can happen, and I needed to check whether that was what
11:59:47AM 9 was happening in this market.

11:59:49AM 10 Q So by capacity here in this particular market, what are we
11:59:53AM 11 talking about?

11:59:53AM 12 A So we're talking about interior molded door skins used in
11:59:57AM 13 the United States, so we're talking about capacity to make
12:00:00PM 14 those door skins, and that's what we need to track. We can
12:00:06PM 15 look at Jeld-Wen, and we can look at Masonite. Those are the
12:00:08PM 16 companies. We know more about Jeld-Wen. So capacity to make
12:00:13PM 17 interior molded door skins.

12:00:14PM 18 Q Just, again, to make sure we're all clear on this, let's
12:00:18PM 19 take the Towanda plant that we've all heard about. That has a
12:00:22PM 20 capacity to make 25 million door skins a year. You're aware of
12:00:26PM 21 that?

12:00:26PM 22 A Okay. I appreciate you giving me the number.

12:00:29PM 23 Q Okay. So when we're talking about capacity, we're talking
12:00:32PM 24 about how many door skins can Jeld-Wen's or Masonite's
12:00:35PM 25 factories make; is that fair?

12:00:37PM 1 A Yeah. I think probably the term, it's how much can you
12:00:41PM 2 make before you just can't make any more, and usually in
12:00:45PM 3 manufacturing industries, there's something called a nameplate
12:00:48PM 4 capacity which is like -- but you can't really operate at
12:00:51PM 5 100 percent. So we'll be looking at realistic capacity of
12:00:55PM 6 these plants, door skin facilities including Towanda and
12:01:01PM 7 including Dodson.

12:01:02PM 8 Q As we look at this slide here in front of us of housing
12:01:05PM 9 starts, did this increased demand for door skins exceed the
12:01:09PM 10 available capacity?

12:01:11PM 11 A No. So in a general picture, the way I -- what I would
12:01:17PM 12 communicate, I believe, is there's -- throughout this whole
12:01:19PM 13 period, since 2009, there's been plenty of available capacity
12:01:25PM 14 to make door skins in North America. That's, in part, because
12:01:31PM 15 demand was so much higher back in 2005.

12:01:33PM 16 You saw that picture, if you go back one, if you can do
12:01:38PM 17 that, so the industry was able -- was tight then. I can't
12:01:45PM 18 remember exactly how tight, but that was two million houses a
12:01:49PM 19 year, housing starts in 2005.

12:01:52PM 20 With the recovery we've talked about now, we're up to more
12:01:56PM 21 than half of that but not much more than half. So there's
12:02:00PM 22 still plenty of capacity, and that's what we find when we look
12:02:04PM 23 at the situation in 2012, '13, '14. So we measure capacity
12:02:11PM 24 utilization which is how much are you producing compared to how
12:02:20PM 25 much -- your capacity, and it's that ratio.

1 You can see the red at the top. So the 100 percent would
2 be the nameplate capacity, but that's not practical. We have
3 evidence that for these plants --

4 Q Let me make sure the jury is clear about the red line on
5 top. What you are saying there is that if Jeld-Wen and
6 Masonite ran their plants to the maximum capacity utilization,
7 they wouldn't use 100 percent of the manufacturing capacity but
8 just 91 or 92 percent; is that what you are saying?

9 A Let me put it this way: This is just about Jeld-Wen's
10 here. That's where we have the detailed data here. That's on
11 the vertical axis, Jeld-Wen capacity utilization. So it's not
12 realistic to achieve 100 percent as a practice.

13 THE COURT: In any plant.

14 THE WITNESS: As a group. I don't have this broken
15 down plant by plant, at least in my memory. So the realistic
16 effective maximum is around 91 or 92 percent. This is what I
17 understand from the company's documents.

18 So if they were getting close to that level, then
19 things would be really tight. It might look like there's eight
20 percent left, but it's not really available. So that's the
21 thing to look at, are they getting close to the 91 and
22 92 percent, and the data showed that they are not.

23 In 2012, they were at 67 percent capacity
24 utilization, so that left 24, 25 percent available. And later,
25 when we're trying to test to see whether things got really

12:04:02PM 1 tight, they are a little bit higher, 70 to 73, depending how
12:04:09PM 2 you measure some of these things, but there's still quite a bit
12:04:12PM 3 of available capacity, and that's what their documents indicate
12:04:15PM 4 as well, during this later period, that they -- they generally
12:04:19PM 5 took the view that there was quite a bit of available capacity
12:04:26PM 6 still in the later period of time here.

12:04:28PM 7 Q So in your opinion, in view of the available capacity that
12:04:33PM 8 existed in both 2012 and 2016, is it your opinion that
12:04:40PM 9 increased demand does or does not explain the price increases
12:04:44PM 10 that we're seeing?

12:04:45PM 11 A So I am concluding that increase in demand does not
12:04:49PM 12 explain the price increase. I would have -- if I had seen very
12:04:54PM 13 tight capacity, then that might have been an explanation, but I
12:04:57PM 14 didn't see that. So I can rule out increased demand as a cause
12:05:01PM 15 of the prices going up.

12:05:03PM 16 Q So now that you've looked at the potential alternative
12:05:07PM 17 explanations for price increases, in your opinion, what caused
12:05:12PM 18 the Jeld-Wen prices for door skins to go up after the 2012
12:05:16PM 19 merger?

12:05:17PM 20 A So at this point, we've seen that prices did go up. We've
12:05:22PM 21 ruled out the other explanations that seem possible, and so we
12:05:27PM 22 are back to the merger as the cause as we were so suspecting
12:05:33PM 23 from earlier in the analysis based on the market concentration.

12:05:36PM 24 Q All right. So now let's look at the remaining competitor
12:05:43PM 25 to Jeld-Wen after the merger, and that is Masonite. Did you

12:05:49PM 1 examine Masonite's behavior after the merger?

12:05:52PM 2 A Yes, I did.

12:05:53PM 3 Q Why did you look at what Masonite was doing after the
12:05:56PM 4 merger?

12:05:57PM 5 A Because I'm interested in what happened to the competition
12:06:00PM 6 in this market, and we spent a lot of time on one of the
12:06:04PM 7 suppliers, Jeld-Wen, but I also want to look at the other
12:06:07PM 8 supplier. Just like I'm interested in all the customers, I'm
12:06:10PM 9 interested in all the suppliers to understand the market. We
12:06:13PM 10 have one other supplier here, Masonite. So we got to look at
12:06:16PM 11 them.

12:06:17PM 12 Q Have you heard of the term incentives or economic
12:06:21PM 13 incentives used in connection with antitrust economics that you
12:06:25PM 14 work on?

12:06:26PM 15 A It's a primary part of what we do. We study how -- the
12:06:32PM 16 incentives firms have. That is, we assume they're out to make
12:06:36PM 17 money, and what does that mean in terms of their pricing, in
12:06:39PM 18 terms of their other conduct. That's the main approach that
12:06:43PM 19 antitrust economists take to the whole exercise.

12:06:45PM 20 Q And did you look into how Jeld-Wen's acquisition of CMI
12:06:51PM 21 affected Masonite's incentives to compete?

12:06:54PM 22 A Yes, I did.

12:06:55PM 23 Q And in what ways could the merger affect Masonite's
12:07:00PM 24 competition with Jeld-Wen?

12:07:01PM 25 A Well, antitrust economists, we generally categorize things

12:07:08PM 1 into two buckets to answer the question. First, Masonite --
12:07:13PM 2 after the merger, they realized they only have one competitor
12:07:17PM 3 now, Jeld-Wen, instead of two. So that changes their
12:07:21PM 4 incentives, just like I said Verizon might not compete as hard
12:07:26PM 5 if T-Mobile has been acquired by AT&T.

12:07:29PM 6 The same thing here, Masonite might not have an incentive
12:07:33PM 7 to compete as hard because they only have one competitor since
12:07:36PM 8 CraftMaster has been acquired. So that three-to-two dynamic,
12:07:40PM 9 Masonite is very aware of it as well, and it affects what they
12:07:43PM 10 do.

12:07:43PM 11 Q You said there was two ways that you looked at it. I take
12:07:46PM 12 it that was one of the ways. What's the other way that you
12:07:48PM 13 looked at how the merger might affect Masonite's competition
12:07:52PM 14 with Jeld-Wen?

12:07:52PM 15 A The other concern we have when markets get concentrated is
12:07:56PM 16 that the firms will engage in some sort of coordination, and
12:07:59PM 17 that's a bad thing as we use the term. That is, instead of
12:08:03PM 18 competing, the remaining firms, here, Jeld-Wen and Masonite,
12:08:07PM 19 will pull their punches, will signal to each other.

12:08:12PM 20 In the extreme case, which I'm not saying happened here,
12:08:16PM 21 extreme case you could have firms engage in some sort of
12:08:19PM 22 conspiracy or illegal conduct to set price, but falling short
12:08:23PM 23 that, they might just compete less vigorously with each other.
12:08:28PM 24 We call this coordinated effects, and it's long been one of the
12:08:31PM 25 major concerns with markets that are highly concentrated. The

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12:08:35PM 1 firms would just be aware that it's better for both of them not
12:08:38PM 2 to compete very much and find a way not to do so.

12:08:42PM 3 Q All right. So in order -- the kind of coordination that
12:08:45PM 4 you were just referring to, does that require expressed direct
12:08:51PM 5 communication between, let's say, Jeld-Wen and Masonite?

12:08:54PM 6 A No. That would be some sort of communication, some
12:08:59PM 7 sort -- would be an extreme case of coordination, probably
12:09:03PM 8 would be illegal as I understand antitrust law. I'm not
12:09:05PM 9 talking about that. The other type of thing that can happen is
12:09:08PM 10 simply what we sometimes call tacit coordination or sometimes
12:09:13PM 11 call parallel accommodating conduct.

12:09:16PM 12 Basically, the firms watch each other, and so it might --
12:09:21PM 13 I have some customers, you have some customers, I won't go
12:09:23PM 14 after your customers, you don't go after my customers, and
12:09:26PM 15 we'll just let it sit like that, and if you start coming after
12:09:30PM 16 my customers I'm going to do the same, and you can see that can
12:09:34PM 17 kind of settle in.

12:09:36PM 18 That can happen with two firms. It's much less likely if
12:09:39PM 19 there are five or six or ten firms, and that's why we worry
12:09:43PM 20 about concentration. So there are a range of ways in which,
12:09:47PM 21 when you only have two firms, they can coordinate without any
12:09:53PM 22 express agreement or direct, you know, sort of shady
12:09:57PM 23 communication. It's not what I'm talking about.

12:09:59PM 24 Q So I think in one of your earlier answers, you used the
12:10:02PM 25 term signalling. What does signalling mean to an antitrust

12:10:06PM 1 economist?

12:10:07PM 2 A Well, in this context, take my example with the dividing
12:10:13PM 3 up customers, we call it, where you have your customers, I have
12:10:15PM 4 my customers. I might just say, you know, I'm -- I might make
12:10:20PM 5 a public announcement, I'm really happy with my customers, I'm
12:10:24PM 6 going to focus on them in my business activities; okay?

12:10:27PM 7 Well, you might get the message, okay, he's happy with
12:10:31PM 8 things. It might help to kind of live and let live situation,
12:10:34PM 9 so a communication that could facilitate this type of
12:10:38PM 10 coordination, we would call that a signal.

12:10:40PM 11 Q How could a merger make it easier for the remaining
12:10:45PM 12 suppliers in the market to coordinate?

12:10:47PM 13 A Well, simply because there's only two -- a smaller number
12:10:53PM 14 in general. I'm thinking the three to two, so it's -- if we
12:10:58PM 15 imagine this situation where we're not going aggressively after
12:11:02PM 16 each other's customers, if there's a third smaller player who
12:11:06PM 17 is picking away at the customers, I lose a customer.

12:11:09PM 18 Is it that third person, in which case, okay, I got to
12:11:12PM 19 deal with it, or is it you coming after my customers in which
12:11:15PM 20 case I have to go after your customers. I don't know if
12:11:17PM 21 there's a third player. So it's harder to pull off -- I don't
12:11:23PM 22 want to use that word. It's harder for this type of
12:11:26PM 23 coordinating behavior to stick if there are more players.

12:11:32PM 24 That's one of the main reasons we worry about
12:11:33PM 25 concentration and developed the whole Herfindahl index, was

12:11:38PM 1 based on just this type of logic, actually. That's the
12:11:41PM 2 underlying theoretical -- theoretical underpinnings of that
12:11:43PM 3 index have to do with just this sort of oligopoly behavior.
12:11:49PM 4 Oligopoly means a market with just a few firms.

12:11:51PM 5 Q If you want to look into whether coordination between
12:11:55PM 6 Jeld-Wen and Masonite increased after the merger, what kind of
12:11:59PM 7 evidence would you look for?

12:12:01PM 8 A Well, I mean, we've already looked at prices, so the
12:12:06PM 9 concern, primary concern would be that prices would go up,
12:12:09PM 10 maybe because of coordination. But you could also look at
12:12:12PM 11 whether there was this signalling going on and just were the
12:12:17PM 12 firms competing less, were they signalling each, and do prices
12:12:21PM 13 go up. Those are the sort of things we're looking for.

12:12:24PM 14 Q You have looked at evidence both from Jeld-Wen and
12:12:27PM 15 Masonite and Steves of what happened before the merger and
12:12:30PM 16 after the merger; correct?

12:12:31PM 17 A Yes.

12:12:32PM 18 Q Was Masonite and Jeld-Wen's conduct before the merger
12:12:37PM 19 consistent or inconsistent with coordination?

12:12:39PM 20 A I don't see coordination before the merger. So think of
12:12:46PM 21 the two episodes we went through before the merger. Remember
12:12:50PM 22 the CARB episode where Jeld-Wen tried to raise the price, and
12:13:00PM 23 Steves managed to avoid that to a large degree by shifting
12:13:05PM 24 sales in a significant degree to Masonite. So that's not
12:13:08PM 25 coordination, that's competition, and likewise in the

12:13:11PM 1 competition to win Steves' business. So those episodes were
12:13:16PM 2 illustrating competition. That's not coordination. I didn't
12:13:19PM 3 see coordination going on before the merger.
12:13:21PM 4 Q And let's talk about after the merger. Have you seen
12:13:24PM 5 evidence that's consistent with coordination after the merger?
12:13:27PM 6 A I have.
12:13:28PM 7 Q Let's look at some of that evidence. Let me start with
12:13:31PM 8 this document. How did this document inform your understanding
12:13:35PM 9 of coordination after the merger?
12:13:38PM 10 A So this is May 2014. We have Masonite making a public
12:13:44PM 11 statement that they will not sell molded door facings or door
12:13:49PM 12 skins to others in the North American space. So they're
12:13:52PM 13 stating they're not going to be selling door skins to the
12:13:55PM 14 independent door manufacturers.
12:13:58PM 15 Q And they're stating this publicly?
12:13:59PM 16 A It's a public statement.
12:14:00PM 17 Q Now, explain to the jury how this document informs your
12:14:03PM 18 understanding of coordination after the merger.
12:14:06PM 19 A This is a document from Mr. Hachigian just a few days
12:14:11PM 20 after the previous one where he indicates he listened to that
12:14:16PM 21 call -- it was an earnings call, I think, or some sort of
12:14:19PM 22 public statement to analysts -- and he's listening to it, and
12:14:24PM 23 he's communicating to others within Jeld-Wen that he's taking
12:14:29PM 24 note of the statement that we highlighted on the Masonite not
12:14:34PM 25 selling door skins to other -- to independent door

12:14:38PM 1 manufacturers.

12:14:38PM 2 Q So, to you, does this document show that Hachigian and
12:14:43PM 3 others at Jeld-Wen heard this message, the one that was stated
12:14:46PM 4 on May 8th?

12:14:47PM 5 A Right. So the first slide shows the message, the public
12:14:51PM 6 statement or message that Masonite sent. The current slide
12:14:55PM 7 shows that message was received at Jeld-Wen.

12:14:58PM 8 Q So now we're about a month later in June, and this
12:15:01PM 9 document is from their Laurel, Mississippi presentation. Could
12:15:06PM 10 you say why this was relevant to your analysis of coordination?

12:15:09PM 11 A So this is, again, a Masonite presentation or document, so
12:15:15PM 12 a reiteration, a repeating of the statement that they will not
12:15:19PM 13 sell door skins within the North American market.

12:15:24PM 14 Q And then this document is now Mr. Hachigian on July 12th,
12:15:29PM 15 just a couple weeks after the Laurel presentation, sending that
12:15:34PM 16 presentation to Sam and Edward Steves. How does this document
12:15:37PM 17 affect your analysis of coordination?

12:15:39PM 18 A This indicates to me that Mr. Hachigian and Jeld-Wen are
12:15:48PM 19 taking note of this, what Masonite said, and introducing that
12:15:53PM 20 into their discussions with Steves where it's pretty plain to
12:15:59PM 21 me as an economist that the underlying point is Jeld-Wen has
12:16:06PM 22 more bargaining power, vis-a-vis Steves, because Masonite is
12:16:09PM 23 not so interested in selling to them.

12:16:11PM 24 Q And then finally, then, this document, how does this
12:16:15PM 25 document relate to your assessment of coordination after the

12:16:19PM 1 merger?

12:16:20PM 2 A So this is a document from Onex -- is that how you say
12:16:25PM 3 it? -- to Mr. Hachigian. Also were there any discussions about
12:16:30PM 4 whether they might terminate their long-term agreement with
12:16:34PM 5 Steves, send a termination notice, and Masonite comes in.
12:16:39PM 6 They're noting -- at least this author here says, given what
12:16:47PM 7 Masonite has said, he's questioning whether Masonite would, in
12:16:52PM 8 fact, then be available to Steves given their statement that
12:16:55PM 9 they're not going to sell door skins in North America.

12:16:59PM 10 Q Then, finally, just five days after this email, we have
12:17:03PM 11 this document, and how does this document affect your analysis
12:17:07PM 12 of coordination after the merger?

12:17:09PM 13 A Well, this is the termination notice from Jeld-Wen to
12:17:14PM 14 Steves. So in the context of a circumstance where Masonite has
12:17:20PM 15 indicated they're pulling back from selling door skins, and
12:17:25PM 16 that, I think, clearly gives Jeld-Wen the upper hand here, and
12:17:30PM 17 they've chosen to, at this point, send a notice of termination.

12:17:35PM 18 Q So now putting all of these documents we just went through
12:17:38PM 19 together, how does Masonite's public announcements and
12:17:42PM 20 Jeld-Wen's conduct after those announcements affect your
12:17:47PM 21 analysis of whether the CMI/Jeld-Wen merger substantially
12:17:52PM 22 lessened competition?

12:17:53PM 23 A So before the merger, Steves -- let's use them as an
12:17:58PM 24 example here of the customer -- they have three choices. We
12:18:01PM 25 talked about that. It went down to two.

12:18:04PM 1 Now, when Masonite signals they're really not interested
12:18:07PM 2 in selling, they say they're not going to sell -- we'll see
12:18:11PM 3 they do a little sales, but they're clearly sending a signal
12:18:13PM 4 we're not interested in making these sales. Steves' choices
12:18:18PM 5 have now narrowed, if you take that at face value, to one,
12:18:22PM 6 Jeld-Wen. And so that's a very dramatic lessening of
12:18:26PM 7 competition, and so Masonite's behavior here is directly
12:18:31PM 8 relevant for assessing the loss of competition that flowed from
12:18:36PM 9 the merger.

12:18:37PM 10 Q All right, so you said that there was some small sales by
12:18:42PM 11 Masonite of door skins after the merger. Let's turn to that.
12:18:45PM 12 Could you explain to the jury what this slide is showing.

12:18:48PM 13 A Yes. So I would focus on the right-hand side, actually,
12:18:55PM 14 since that's where we are really in the narrative, 2016. By
12:19:02PM 15 that time, Jeld-Wen had 95 percent of the sales of door skins
12:19:09PM 16 to independent door manufacturers, external customers.

12:19:12PM 17 So Masonite is still selling some, but it's a much smaller
12:19:15PM 18 number. The pie chart on the left is kind of a reminder of
12:19:19PM 19 what things were like the year before the merger where
12:19:23PM 20 CraftMaster was quite large in these sales.

12:19:31PM 21 So my point of this is that I didn't just take as given
12:19:37PM 22 Masonite said they were going to stop selling so they stopped
12:19:40PM 23 selling. I checked the data, and they did sell some, but you
12:19:43PM 24 will see it's in a much more limited way, and we see that
12:19:46PM 25 first, by looking at the data here, they're only making five

12:19:50PM 1 percent.

12:19:50PM 2 Q And I want to look at that five percent for a second. Do
12:19:54PM 3 you recall, from your review of the evidence, what kinds of
12:19:57PM 4 sales and what kind of companies are actually comprising that
12:20:00PM 5 five percent?

12:20:01PM 6 A I don't remember specifics. I just know that if you -- go
12:20:05PM 7 back to those Masonite statements, they said they won't sell to
12:20:09PM 8 competition is what they're thinking. So they're trying to
12:20:12PM 9 sell to companies that they don't see are really competing as
12:20:15PM 10 directly with them in the sale of doors.

12:20:17PM 11 Q Do you recall that some of those customers, for example,
12:20:20PM 12 made closet doors?

12:20:21PM 13 A That sounds right.

12:20:22PM 14 Q All right. So the jury has seen video testimony of Fred
12:20:29PM 15 Lynch, the CEO of Masonite, and I've put up just a little bit
12:20:34PM 16 of what the jury heard. Does this testimony affect your
12:20:38PM 17 analysis in any way?

12:20:40PM 18 A Yes. Well, this confirms that the -- the change in
12:20:46PM 19 behavior at -- excuse me, at Masonite, from competing to get
12:20:51PM 20 Steves' business under a long-term agreement in 2011, and they
12:20:55PM 21 were no longer interested in that four years later.

12:20:58PM 22 Q Is it your understanding that this five percent little
12:21:01PM 23 slice we have here of Masonite does not include sales under any
12:21:05PM 24 long-term supply agreements?

12:21:07PM 25 A That is my understanding as I remember it right now.

12:21:10PM 1 Q So if it's not a long-term supply agreement, then do you
12:21:14PM 2 understand it's on a, quote, spot basis?

12:21:16PM 3 A Yes. That's more of the term for somebody comes with an
12:21:22PM 4 order, and you give a price and you fill it, or you may don't
12:21:25PM 5 fill. That's what he's saying here. He says they will
12:21:29PM 6 consider orders, and they may or may not fill them.

12:21:32PM 7 So this is a pretty big change in their behavior in that
12:21:37PM 8 -- I think you've seen evidence -- I've certainly seen evidence
12:21:40PM 9 -- that Steves, it's very important to them to have an assured
12:21:43PM 10 long-term source of supply of door skins.

12:21:46PM 11 Spot purchases, yes, they make them sometimes, but -- the
12:21:50PM 12 other independent door manufacturers make them sometimes, but
12:21:54PM 13 it's very desirable to have a long-term agreement, and Masonite
12:21:57PM 14 is not -- no longer going for that, no longer competing for
12:22:01PM 15 that. That's a significant change and loss of competition.

12:22:05PM 16 Q So when -- let's look at the prices that Masonite was
12:22:09PM 17 charging when it chose to fill a spot order as Mr. Lynch says
12:22:14PM 18 here. Have you looked at this document in connection with your
12:22:17PM 19 studying an analysis of the merger?

12:22:19PM 20 A Yes. So you see the title Masonite Pricing After the
12:22:23PM 21 Merger. It's a January 1, 2015, price list, as usual,
12:22:29PM 22 different types of door skins and different sizes, and I was
12:22:34PM 23 able to compare these prices with the prices that Masonite had
12:22:39PM 24 offered before the merger, and they are substantially higher.

12:22:43PM 25 The amount -- it varies from type of door skin to type,

12:22:48PM 1 but that's the range there. They are 27 to 225 percent higher.
12:22:53PM 2 So when they're willing to fill orders in the later period
12:22:58PM 3 here, they were also charging a lot more. So the whole
12:23:03PM 4 discussion about did prices go up after the merger, we spent a
12:23:07PM 5 long time talking about Jeld-Wen prices, but we can also see
12:23:10PM 6 Masonite's prices went up substantially as well. This shows
12:23:14PM 7 that.

12:23:15PM 8 Q All right. So let's go back to the industry structure
12:23:18PM 9 after the merger. In your view as an economist, does Masonite
12:23:24PM 10 have an economic incentive to pull back from competing in the
12:23:28PM 11 door skin market?

12:23:29PM 12 A Yes. So one of the things that might seem odd is Masonite
12:23:37PM 13 announcing we're not going to sell these door skins anymore.
12:23:41PM 14 Just take that announcement. Why would a company stop selling
12:23:46PM 15 something they're making a profit on? What's going on? What
12:23:49PM 16 sense does that make? And a big part of it is that they're
12:23:53PM 17 thinking about the profits from doors, and so they understood
12:24:01PM 18 that if -- they might make less money selling some door skins
12:24:06PM 19 but more than make it up on selling doors.

12:24:08PM 20 So that's why it would -- could make sense, and, here, did
12:24:12PM 21 apparently, from Masonite's point of view, make sense to pull
12:24:15PM 22 back from selling door skins and look to make more money
12:24:19PM 23 selling doors. Otherwise, it's just odd. Why would a company
12:24:22PM 24 just withdraw like that? But we have a very good reason here
12:24:25PM 25 that is clearly consistent with their own economic incentives.

12:24:29PM 1 Q Have you seen evidence showing that Masonite realized that
12:24:34PM 2 it had this economic incentive?

12:24:36PM 3 A Well, yes. Here we have an indication of Masonite's
12:24:42PM 4 recognizing. In the highlighted portion --

12:24:48PM 5 Q Let me step back. Can you explain to the jury what this
12:24:53PM 6 C.L. King Conference is and who is speaking here?

12:24:56PM 7 A So this is another document that we have based on what
12:25:01PM 8 Masonite executives were saying to investors.

12:25:05PM 9 Q Could you explain to the jury why the sentence that's
12:25:08PM 10 highlighted here supports your opinions regarding Masonite's
12:25:13PM 11 economic incentives?

12:25:14PM 12 A Right. So this is during a period of time when Masonite
12:25:18PM 13 becomes aware that Jeld-Wen has sent this termination notice to
12:25:22PM 14 Steves, or is considering it, and they're trying to figure out
12:25:28PM 15 what impact will that have on us, Masonite. They're talking to
12:25:31PM 16 their investors, and they're saying if Jeld-Wen is successful
12:25:35PM 17 in terminating Steves and some of the other regionals, that's
12:25:38PM 18 what we're calling independent door manufacturers, 20 percent
12:25:41PM 19 of the marketplace is potentially up for a share grab
12:25:44PM 20 effectively between two large players.

12:25:47PM 21 So that is they're recognizing if the independents have
12:25:51PM 22 trouble getting door skins, can't make as many doors, that
12:25:57PM 23 makes more door sales for the two large players, Jeld-Wen and
12:26:01PM 24 Masonite, to pick up more money selling doors. So they
12:26:06PM 25 clearly understand -- I mean, the economic incentive I

12:26:09PM 1 identified, they get it, and then they happen to add -- in
12:26:12PM 2 thinking about this, they say, if Jeld-Wen terminates Steves
12:26:15PM 3 and the other guys, we're going to get more door sales, and the
12:26:19PM 4 last part here said, well, they're -- maybe Steves will find
12:26:23PM 5 another way to get the door skins. They're saying, but, no, it
12:26:27PM 6 will be very difficult for Steves to import product, door
12:26:32PM 7 facings specifically.

12:26:33PM 8 So they're thinking, what's Steves going to do. If
12:26:37PM 9 Jeld-Wen terminates them, they can't get door skins, they're
12:26:40PM 10 saying they're going to have some trouble, Masonite expects to
12:26:45PM 11 pick up sales, and Steves won't be able to solve the problem
12:26:48PM 12 through imports because it's very hard.

12:26:51PM 13 That's how they see it. Also how I see it, okay? The
12:26:57PM 14 incentives are clearly there for Masonite in terms of grabbing,
12:27:00PM 15 their word, but picking up more share of doors, and they've
12:27:04PM 16 specifically considered counterstrategies by Steves and imports
12:27:08PM 17 being very difficult, whatever the word is, very difficult.

12:27:11PM 18 Q All right. So now let's go back to your three-step
12:27:18PM 19 analysis. I think we've now finished step two; is that
12:27:22PM 20 correct, Professor Shapiro?

12:27:23PM 21 A I hope so.

12:27:24PM 22 Q So let's go --

12:27:26PM 23 A I think we have.

12:27:27PM 24 Q -- to step three. So after you've looked at the last five
12:27:33PM 25 years and what's actually happened in the last five years, what

12:27:36PM 1 did you do next?

12:27:37PM 2 A So far, this analysis indicates that there has been harm
12:27:43PM 3 to the independent door manufacturers, lessened competition
12:27:47PM 4 over the past five years resulting from the merger. Next
12:27:50PM 5 question is, is that going to continue, or will something
12:27:53PM 6 change in the future so that won't -- that these effects will
12:27:58PM 7 not continue. That's the next question.

12:28:00PM 8 Q So how did you go about evaluating whether this merger is
12:28:05PM 9 likely to harm competition in the future?

12:28:07PM 10 A So this is what we would generally -- antitrust economists
12:28:10PM 11 call analysis of entry, because the big question now is, will
12:28:14PM 12 other suppliers come in to save the day, will there be new
12:28:19PM 13 choices that will be available to Steves or other independent
12:28:21PM 14 door manufacturers. Since the three choices went to two and
12:28:26PM 15 it's not looking good, can they turn somewhere else. So entry,
12:28:30PM 16 a new supplier. So that's what we want to look into next.

12:28:34PM 17 Q All right. And what new sources of supply did you
12:28:38PM 18 consider?

12:28:39PM 19 A So, basically, you build it or you buy it; okay? You can
12:28:44PM 20 -- potentially Steves, or others, could build a door skin
12:28:50PM 21 plant, so they would get their own supply that way.
12:28:54PM 22 Alternatively, they could import, because there are production
12:28:57PM 23 facilities elsewhere in the world.

12:28:59PM 24 Q And so the reason why you're looking at these options is
12:29:02PM 25 to figure out if something is going to happen in the future to

12:29:05PM 1 restore the competition that was lost when CMI was acquired;
12:29:09PM 2 correct?

12:29:09PM 3 A Yes, that's right. I think the words I like are will this
12:29:15PM 4 possible entry restore competition to where it was before the
12:29:18PM 5 merger, or will it cure the problems, is another way to think
12:29:23PM 6 about it, that the merger caused in terms of reduced
12:29:25PM 7 competition.

12:29:26PM 8 Q So how does an economist evaluate whether a new potential
12:29:30PM 9 supply option will restore competition in a market?

12:29:33PM 10 A So we have a three-part test that we use in thinking about
12:29:38PM 11 possible entry. In order to restore competition, the entry has
12:29:44PM 12 to be timely, likely, and sufficient to -- for that purpose.

12:29:51PM 13 So there's these three things we look at: Can it happen
12:29:56PM 14 soon enough, is it pretty likely to happen, and will it be
12:30:00PM 15 enough to make up for the fact that the company was acquired.
12:30:03PM 16 So those are our three tests, and that's where we're going to
12:30:07PM 17 go, and we could apply that way of thinking to building or
12:30:11PM 18 importing. The test could apply to any type of entry. We've
12:30:16PM 19 got two that we're considering here.

12:30:17PM 20 Q At the end of step two of your analysis, just back up a
12:30:22PM 21 slide, so at the end of this step, you concluded that the
12:30:26PM 22 merger has already harmed competition; correct?

12:30:29PM 23 A That's right.

12:30:30PM 24 Q So how does this consideration of new options, how does
12:30:37PM 25 that affect the fact that the merger has already harmed

12:30:40PM 1 competition?

12:30:40PM 2 A So from my point of view, I already know the answer that
12:30:45PM 3 the merger has caused a substantial lessening of competition in
12:30:50PM 4 the market for interior molded door skins used in the United
12:30:54PM 5 States. The question, to me -- an additional question is will
12:30:57PM 6 that harm continue. The fact that entry hasn't solved the
12:31:02PM 7 problem for five years so far makes me kind of skeptical, I
12:31:08PM 8 guess I would say, that it's going to solve the problem in the
12:31:11PM 9 future.

12:31:12PM 10 Now, it's possible, and we need to look at that, but we do
12:31:17PM 11 already have five years of experience, and entry has not, by
12:31:21PM 12 any means, solved the problem so far.

12:31:24PM 13 Q By entry, you mean no one has built a new door skin plant
12:31:27PM 14 in the United States since 2012; correct?

12:31:30PM 15 A Right. So the two types of entry, nobody has built a new
12:31:34PM 16 door skin facility, and nor are imports coming in in
12:31:41PM 17 significant volumes in a way that would have prevented these
12:31:45PM 18 price increases. It hasn't happened.

12:31:47PM 19 Q So how did you go about analyzing whether building a door
12:31:52PM 20 skin plant was a realistic option going forward?

12:31:55PM 21 A So never having built one myself, you basically turn to
12:32:00PM 22 the people in the industry. The first thing an economist looks
12:32:04PM 23 at is, have plants been built recently, what's involved, how
12:32:09PM 24 long does it take, how much money. Basically you look at what
12:32:12PM 25 the industry experts know about this from actual real-world

12:32:18PM 1 experience. That's the first thing I did on the building side.

12:32:20PM 2 Q When you say industry experts at building door skin

12:32:24PM 3 plants, who are the people in the industry who have experience

12:32:27PM 4 building door skin plants?

12:32:29PM 5 A Well, we're talking North America now, the United States,

12:32:33PM 6 and we're talking about Jeld-Wen and Masonite. Of course,

12:32:36PM 7 CraftMaster did have experience, but they're part of Jeld-Wen

12:32:38PM 8 now. So the two of them. They're the ones who have built and

12:32:42PM 9 owns these facilities, so we want to look to see what their

12:32:46PM 10 experience is doing that.

12:32:47PM 11 Q So what did you learn when you looked at Jeld-Wen's

12:32:51PM 12 information regarding how easy or difficult it would be to

12:32:55PM 13 build a door skin plant?

12:32:57PM 14 A So this is a slide deck from Jeld-Wen, barriers to entry.

12:33:03PM 15 They're talking about difficulties that somebody would have to

12:33:07PM 16 enter into the production of door skins, the very question

12:33:12PM 17 we're asking about, and we've highlighted some of the elements

12:33:16PM 18 here, significant capital investment.

12:33:21PM 19 The ones that I would highlight especially would be

12:33:25PM 20 technically challenging equipment, steep learning curve. Those

12:33:29PM 21 are indications, to me, that in addition to getting the money

12:33:34PM 22 together, there's a lot of uncertainty and challenges. It's

12:33:38PM 23 hard to do. And it's even hard for the people who have done it

12:33:42PM 24 already, even harder for a company that's not done it before.

12:33:45PM 25 Q And you understand Steves to be a company that has not

12:33:49PM 1 done it before?

12:33:50PM 2 A They have not.

12:33:50PM 3 Q So Jeld-Wen is one of those companies that has experience
12:33:54PM 4 building door skins plants; right?

12:33:56PM 5 A Quite a bit.

12:33:57PM 6 Q And are you aware that they have recently built a door
12:34:03PM 7 skin plant in the United States?

12:34:03PM 8 A So that would be the next place, as I said, to look, at
12:34:06PM 9 actual plants that have come online or been built recently,
12:34:10PM 10 what happened, and so they have the Dodson facility in
12:34:12PM 11 Louisiana is their most recent addition, so very useful to look
12:34:17PM 12 at what happened there.

12:34:18PM 13 Q And so the jury heard yesterday from Mr. Fedio about the
12:34:22PM 14 various problems that Jeld-Wen has experienced with Dodson and
12:34:26PM 15 from other witnesses as well. Did Jeld-Wen's experience with
12:34:30PM 16 Dodson give you any information on whether building a new plant
12:34:35PM 17 would be a timely, likely, and sufficient opportunity to
12:34:37PM 18 restore competition?

12:34:39PM 19 A Yes, I think it's highly relevant. The main thing I take
12:34:43PM 20 away from the experience there was it took a long time. Takes
12:34:50PM 21 many years to build, and even after you get it operating, it's
12:34:55PM 22 difficult to get it operating smoothly, the learning curve, the
12:34:59PM 23 technical challenge environment, and we're showing you here a
12:35:04PM 24 slide from Jeld-Wen about a year or so after Dodson has opened,
12:35:09PM 25 and they're experiencing a 40 percent scrap rate as well as

12:35:13PM 1 some other gluing issues, but the scrap rate, my understanding
12:35:18PM 2 is that's basically the percentage of products -- they're not
12:35:23PM 3 good enough to be shipped and used. That's very problematic
12:35:30PM 4 even a year out. So that's their experience.

12:35:34PM 5 Q Do you know if Jeld-Wen has fixed its problems at Dodson
12:35:39PM 6 by 2017?

12:35:41PM 7 A Well, you can see here, according to Mr. Fedio -- this is
12:35:44PM 8 from July of last year -- he still doesn't regard it as
12:35:47PM 9 satisfactory.

12:35:48PM 10 Q Did you also look at Masonite's documents to evaluate
12:35:52PM 11 whether building a new door skin plant is a timely, likely, and
12:35:56PM 12 sufficient alternative here?

12:35:57PM 13 A Yes, I did.

12:35:58PM 14 Q And let's look -- do you recall this being the Laurel
12:36:02PM 15 presentation?

12:36:02PM 16 A Yes, that's correct.

12:36:03PM 17 Q And did you consider this document as you evaluated the
12:36:06PM 18 possibility of building a door skin plant?

12:36:08PM 19 A I did.

12:36:09PM 20 Q So let's turn to the -- what is this page -- this is a
12:36:13PM 21 page from that presentation; correct?

12:36:15PM 22 A Yes. And if you see up at the top, it says residential
12:36:19PM 23 interior door facings, so we're talking about the door skins,
12:36:23PM 24 and they're specifically asking the very same question I'm
12:36:26PM 25 interested in, what would it take for new entrants to come into

1 the market. So I'm very interested in what they think about
2 that.

3 Again, market entry is here up at the top, and at the
4 bottom I've highlighted for you one of their takeaways here,
5 each step of production poses unique challenges. And they've
6 got some details on that, what's behind that. So they are
7 certainly emphasizing here that this is challenging, there are
8 technical difficulties of various sorts.

9 Q As well as the cost of building it which is reflected on
10 this slide; correct?

11 A Yes. I think it's not disputed that it costs these --
12 these facilities cost 100 to 150 million -- it says there per
13 line. Total cost depends on how big a facility you build, but
14 this is the range they're talking about, and that's -- at the
15 upper end of that is the range Jeld-Wen experienced for Dodson.

16 Q As Masonite is using the term entry here, you understand
17 this to be saying, this is what it would cost someone to be a
18 meaningful entrant into the market?

19 A I'd have to check their slides. I'm not exactly sure.

20 Q Let's go to the next slide. You also reviewed this slide
21 as part of your analysis of building a door skin plant;
22 correct?

23 A Right. So this is the same deck, and this is confirmed in
24 other information. It takes four years or so, and they explain
25 why, and they talk about the production hurdles, again the

12:37:58PM 1 technical challenges.

12:38:00PM 2 So I'm seeing that quite consistently from both two
12:38:04PM 3 suppliers, what's involved. It's quite a bit of money, takes
12:38:07PM 4 time, and it's technically challenging.

12:38:10PM 5 Q Now, do you know or have you seen any evidence as to
12:38:13PM 6 whether Steves has been exploring an option of building a new
12:38:17PM 7 door skin plant?

12:38:17PM 8 A I have.

12:38:18PM 9 Q Given that building a new door skin plant is both
12:38:21PM 10 expensive and very challenging, did it surprise you to see
12:38:25PM 11 Steves exploring this option?

12:38:26PM 12 A No, not at all.

12:38:28PM 13 Q Why not?

12:38:29PM 14 A Well, Steves is in a tough spot. They've been terminated
12:38:34PM 15 by Jeld-Wen. Masonite has indicated they're not interested in
12:38:38PM 16 a long-term agreement. It's completely predictable Steves
12:38:43PM 17 would be exploring alternative options for getting door skins.

12:38:49PM 18 In fact, we'll talk about imports as well. They're
12:38:52PM 19 exploring that, too. So I'm not at all surprised. They've
12:38:57PM 20 been doing that for awhile. It would seem completely, again,
12:39:02PM 21 predictable that the company, in circumstances they're in,
12:39:05PM 22 would do that.

12:39:05PM 23 Q So based on all the evidence that you've seen in this
12:39:08PM 24 case, do you think that a new door skin plant is likely to be a
12:39:12PM 25 timely, likely, and sufficient entrant for a supply source for

Shapiro - Direct

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12:39:17PM 1 independent door skin customers?

12:39:19PM 2 A No, I don't think it is. I mean, the timeliness, it still
12:39:23PM 3 takes four years, even if you pushed the button to start that
12:39:26PM 4 today, which is a long time. And likelihood -- you know, I
12:39:34PM 5 haven't seen convincing analysis that this is all going to
12:39:38PM 6 work, all the pieces you have to do, all the hurdles you have
12:39:42PM 7 to clear. I'm not saying it can't happen. It's just if we're
12:39:45PM 8 trying to peer into the future, this is a tough path to take.

12:39:48PM 9 Q All right. So let's move on to importing door skins, the
12:39:57PM 10 other option that you looked into. Are foreign imports of door
12:40:02PM 11 skins a timely, likely, and sufficient choice for independent
12:40:06PM 12 door manufacturers?

12:40:07PM 13 A I don't think they are either, no.

12:40:10PM 14 Q What evidence have you seen about the possibility of
12:40:13PM 15 foreign imports replacing all of the choices in competition
12:40:17PM 16 lost when CMI was acquired?

12:40:19PM 17 A Well, I think it's important to remember that we're asking
12:40:24PM 18 will the possibility of imports cure the competitive problem,
12:40:28PM 19 restore competition to where it was when there were three
12:40:31PM 20 players instead of two. And so I've looked at evidence -- with
12:40:36PM 21 that question in mind, looking at what I can, learn what I can
12:40:42PM 22 about imports which includes Steves' efforts to explore various
12:40:47PM 23 import options and what they might be able to achieve in that
12:40:52PM 24 regard and what the limitations are.

12:40:53PM 25 Q If I can, quickly go back to slide 59 to remind the jury

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12:40:58PM 1 of what Masonite said publicly about foreign imports. How does
12:41:05PM 2 Masonite's views of whether foreign imports would work affect
12:41:10PM 3 your opinions about whether foreign imports really can replace
12:41:15PM 4 CMI?

12:41:15PM 5 A Well, they're the other supplier here who knows the market
12:41:19PM 6 very well. They say it's very difficult. There's not a lot of
12:41:22PM 7 detail here behind that, but that's significant, and they seem
12:41:26PM 8 to have -- in saying that, they're saying that in the context
12:41:29PM 9 of, we think we're going to pick up some door sales here
12:41:33PM 10 because imports are difficult. So they're relating it to their
12:41:36PM 11 own business. I think it's worthy of attention.

12:41:38PM 12 Q So now let's go back, if we can, skip through some slides
12:41:43PM 13 here and get me back to where we were. Let's look at Steves
12:41:48PM 14 efforts to -- in looking at foreign imports. If you can
12:41:51PM 15 explain to the jury what this slide is showing.

12:41:55PM 16 A This slide depicts the idea that out of about 20 or so
12:42:00PM 17 different designs that Steves uses and gets door skins to make
12:42:10PM 18 these doors, as I understand it, only three are available that
12:42:15PM 19 they've been able to identify, at least through the Teverpan
12:42:18PM 20 discussions they've had, and that's a real problem for them.
12:42:23PM 21 That's a limited product line. It's a limitation on imports in
12:42:28PM 22 terms of what they've been able -- what they're considering
12:42:32PM 23 right now.

12:42:33PM 24 This goes to the sufficiency part. Remember I said
12:42:37PM 25 timely, likely, sufficient. This is a real limitation, how the

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12:42:43PM 1 imports do not appear to be adequate to replace the competition
12:42:47PM 2 that was lost from the merger. Even if figure, all right,
12:42:51PM 3 they'll go to Teverpan or some others, they'll import some door
12:42:54PM 4 skins, they'll do what they can with that, it does not seem
12:42:58PM 5 sufficient to cure the problem and replace the competition.
12:43:01PM 6 That's the question I have in mind.

12:43:03PM 7 Q So here we're seeing three out of 20 designs. You
12:43:07PM 8 understand that each of these designs comes in a whole range of
12:43:10PM 9 heights and widths; correct?

12:43:12PM 10 A Yes. And I believe -- yes, I understand there's been some
12:43:16PM 11 evidence about as many as 477 different models that result when
12:43:21PM 12 you do the multiplications.

12:43:23PM 13 Q And you understand that a very small number of those 477
12:43:26PM 14 are available from all of the foreign suppliers combined?

12:43:30PM 15 A Well, it's going to be a fraction as you've only got these
12:43:34PM 16 three -- again, we're talking about here these three designs.

12:43:38PM 17 Q So what have you concluded regarding the possibility that
12:43:42PM 18 a new supply option will counteract any of the continued harm
12:43:47PM 19 that was caused when Jeld-Wen acquired CMI?

12:43:51PM 20 A So I don't think these new supply options or entry will
12:43:57PM 21 cure the problem going forward. It hasn't happened so far, and
12:44:02PM 22 there are some serious questions and limitations on either the
12:44:07PM 23 building or the importing. Again, I'm not saying there won't
12:44:12PM 24 be some of the imports. I think there will be some, but it
12:44:16PM 25 doesn't seem sufficient.

12:44:18PM 1 Q All right. So let's go back to where we started. This is
12:44:22PM 2 the question that you were asked to answer in your testimony
12:44:26PM 3 today; correct?

12:44:26PM 4 A Yes, sir.

12:44:28PM 5 Q And we've been spending a lot of time talking about the
12:44:31PM 6 substantial lessening of competition; correct?

12:44:33PM 7 A We have.

12:44:34PM 8 Q So I want to go to the last part of this question which
12:44:37PM 9 is, in a relevant market; do you see that term?

12:44:40PM 10 A I do.

12:44:41PM 11 Q And as an antitrust economist, you are familiar with the
12:44:45PM 12 term "relevant market"; correct?

12:44:47PM 13 A Very familiar.

12:44:49PM 14 Q In your analysis, did you consider whether door skin
12:44:54PM 15 customers have choices other than buying interior molded door
12:44:58PM 16 skins used in the United States?

12:44:59PM 17 A I did.

12:45:00PM 18 Q And what kind of choices did you consider?

12:45:02PM 19 A Well, I asked myself whether Steves and other
12:45:08PM 20 manufacturers of interior molded doors could use some other
12:45:13PM 21 input, if door skin prices became too high, as a substitute for
12:45:19PM 22 using the door skins, and there's no alternative that they
12:45:25PM 23 could turn to.

12:45:26PM 24 Q And how does your analysis of these kinds of alternatives
12:45:29PM 25 relate to the question you are being asked to analyze in this

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12:45:32PM 1 case?

12:45:33PM 2 A Well, in terms of defining a relevant market, what
12:45:38PM 3 antitrust economists do is we ask whether the products in that
12:45:43PM 4 market, if they were monopolized, would that lead to higher
12:45:48PM 5 prices than with competition, and if a monopoly with a higher
12:45:53PM 6 price would lead people to just buy something else, then we've
12:45:57PM 7 ignored an important choice, and that grouping of products
12:46:00PM 8 would not be a relevant market.

12:46:02PM 9 Let me give an example. If you want to fly from here to
12:46:05PM 10 Chicago, we'd say, is airline service from Richmond to Chicago,
12:46:12PM 11 is that a relevant market. You'd say, well, what would be the
12:46:15PM 12 choice to flying? You could take a bus, you could drive, take
12:46:19PM 13 the train. Not a very good substitute. Takes a long time. So
12:46:22PM 14 we would probably conclude, pretty sure, that airline flights
12:46:27PM 15 from Richmond to Chicago would be a relevant market.

12:46:31PM 16 That's a product we would want -- we would want to protect
12:46:35PM 17 competition in that. You wouldn't be so happy if there were
12:46:36PM 18 only one airline flying that route. It's better to have two or
12:46:40PM 19 three or more.

12:46:40PM 20 If you said, what about going from Richmond to Washington,
12:46:43PM 21 D.C., well, now, a lot more choices; right? The train is a
12:46:48PM 22 pretty good choice, driving, so it might be looking at the
12:46:51PM 23 airlines would be too narrow a look. That's the sort of
12:46:54PM 24 exercise we do.

12:46:55PM 25 In this case, it's very easy, because there's no good

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12:46:59PM 1 substitute for an interior molded door skin if you want to make
12:47:02PM 2 an interior molded door which is the situation Steves and the
12:47:05PM 3 others are finding themselves in. That's the gist of it.

12:47:07PM 4 Q So you analyzed what the relevant market is in this case;
12:47:12PM 5 correct?

12:47:12PM 6 A Yes.

12:47:13PM 7 Q And what was your conclusion?

12:47:15PM 8 A There it is. I believe there is a relevant market for
12:47:18PM 9 interior molded door skins used in the United States.

12:47:21PM 10 Q And what are the components of this market?

12:47:24PM 11 A Well, we always have a product component and a geographic
12:47:28PM 12 component, and it's obvious what they are here. The product is
12:47:32PM 13 interior molded door skins, and the geographic component is
12:47:36PM 14 used in the United States.

12:47:37PM 15 Q All right, so when you say the geographic market is used
12:47:41PM 16 in the United States, does that include, let's say, foreign
12:47:47PM 17 imports that come into the United States?

12:47:49PM 18 A Yes. Imports are included in the relevant market that I
12:47:53PM 19 have defined.

12:47:54PM 20 Q How did you go about determining that the relevant market
12:48:05PM 21 in the -- sorry, the relevant market is interior molded door
12:48:09PM 22 skins used in the United States?

12:48:10PM 23 A We have a -- we, again, the antitrust economists, have a
12:48:16PM 24 standard test to determine whether a group of product and
12:48:23PM 25 geography is, in fact -- qualifies or meets the test of being a

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1 relevant market. So we look at a candidate group, and then we
2 perform the test, and if it passes, that's a relevant market.
3 If it fails, it's not, and we have to look at something else.

4 So I was pretty sure right at the outset of this case,
5 actually, that the relevant market was interior molded door
6 skins used in the United States, but I performed this test.
7 It's call the hypothetical monopolist test -- sorry about
8 that -- and I performed this test as part of my analysis.

9 I did it three separate ways. They're described here, and
10 all of them -- the test was passed which meant that this
11 grouping I was looking at, interior molded door skins used in
12 the United States, is a properly defined relevant antitrust
13 market as antitrust economists study these things.

14 Q Is the hypothetical monopolist test a well-accepted test
15 among antitrust economists?

16 A Very widely used for many years.

17 Q And the three ways of applying this test that you have
18 here, direct evidence, recapture analysis, and critical
19 elasticity analysis, are they all well-recognized ways of
20 applying the hypothetical monopolist test?

21 A Yes, they are.

22 Q Just very briefly, if you could, could you go each one of
23 these and explain to the jury what you do in this and what you
24 found?

25 A It's really the perfect thing right before lunch. So the

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12:50:01PM 1 direct evidence is that I -- we've talked about it, is that
12:50:06PM 2 competition among the suppliers of interior molded door skins
12:50:11PM 3 caused prices to be at least five percent lower than they would
12:50:17PM 4 otherwise have been without that competition. We saw that in
12:50:20PM 5 the competition for Steves. We saw aspects of that with the
12:50:24PM 6 CARB episode. We've seen that. That's one.

12:50:28PM 7 The second recapture analysis, we have a method of asking,
12:50:32PM 8 if one firm raises their price and they lose some customers, do
12:50:41PM 9 those customers go buy interior door skins -- interior molded
12:50:46PM 10 door skins from other suppliers, or do they do something else
12:50:49PM 11 when it's too expensive.

12:50:51PM 12 If they mostly shift to other interior molded door skins,
12:50:55PM 13 that's a high recapture, and that's going to confirm that this
12:50:59PM 14 is a good group to look at, and the test was easily passed
12:51:04PM 15 there.

12:51:04PM 16 And then the third one is critical elasticity analysis.
12:51:08PM 17 We asked if the price of all the interior molded door skins
12:51:12PM 18 went up, how much would the customers reduce their purchases,
12:51:17PM 19 and if that's not very much, then the test is going to be
12:51:20PM 20 passed. And the data showed that as well here.

12:51:23PM 21 So this is not a close call. We did it -- I did it the
12:51:27PM 22 three ways, and this is a properly defined relevant antitrust
12:51:30PM 23 market, the one I've put forward.

12:51:32PM 24 Q And does Jeld-Wen's economist, Professor Snyder, take
12:51:36PM 25 issue with your market definition in any of his reports?

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12:51:39PM 1 A I do not believe he does.

12:51:41PM 2 Q All right. So let's get back down now to the summary of
12:51:46PM 3 what you've done. We've now gone through all these steps;
12:51:49PM 4 correct?

12:51:49PM 5 A Yes.

12:51:50PM 6 Q Could you just summarize for the jury what you found after
12:51:55PM 7 performing each of these three steps.

12:51:58PM 8 A So each step I've indicated what the study was and now in
12:52:05PM 9 the blue at the bottom are the findings. The first phase, the
12:52:08PM 10 merger reduced choices from three to two. We measured the
12:52:11PM 11 concentration with the Herfindahl, the HHI. It was a very
12:52:15PM 12 large increase in concentration, well into the zone highly
12:52:18PM 13 concentrated, big increase. That was signalling that the
12:52:22PM 14 merger would be likely to harm competition.

12:52:25PM 15 Then we looked at the five years experience since the
12:52:29PM 16 merger, see what actually happened. We did see door skin
12:52:33PM 17 prices going up. My focus is on prices. I considered whether
12:52:36PM 18 there were reasons for that other than the merger, both demand
12:52:40PM 19 and costs, and I ruled those out.

12:52:43PM 20 We also have seen this type of coordinated behavior,
12:52:47PM 21 signalling that is worrisome, in a market with two players, and
12:52:51PM 22 that actually led to Steves being in a more difficult position.
12:52:55PM 23 So those are effects that we've seen over the five years.

12:52:59PM 24 Looking forward, I don't see any real reason why these
12:53:02PM 25 conditions are going to change. The harm to competition is

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12:53:06PM 1 likely to continue. There may be some entry in the form of
12:53:10PM 2 imports. I wouldn't rule that out, but it does not seem
12:53:14PM 3 sufficient to restore competition to cure the problem.

12:53:18PM 4 Q Let's come back to the question. Based on everything you
12:53:24PM 5 have analyzed, all the work you've done, how do you answer the
12:53:29PM 6 following question: Does Jeld-Wen's acquisition of CMI
12:53:32PM 7 substantially lessen competition in a relevant market?

12:53:35PM 8 A I believe it does.

12:53:36PM 9 MR. POMERANTZ: I have no further questions.

12:53:38PM 10 THE COURT: All right, ladies and gentlemen, we'll
12:53:40PM 11 have lunch at this time. I think you all ordered some pizza or
12:53:46PM 12 whatever. Unfortunately, I'm told that it came about
12:53:50PM 13 40 minutes ago, so I don't know it will be cold, but you need
12:53:56PM 14 to pop some of it in the microwave.

12:53:59PM 15 We'll take an hour for lunch, because I have
12:54:02PM 16 something to do with the lawyers. You can just take those with
12:54:05PM 17 you, yes, thank you.

12:54:06PM 18
12:54:06PM 19 (Jury out.)

12:54:28PM 20
12:54:28PM 21 THE COURT: Was it now that you proposed to argue the
12:54:34PM 22 issue of future lost profits, or was it after Shapiro -- Dr.
12:54:43PM 23 Shapiro finishes his testimony?

12:54:44PM 24 MR. POMERANTZ: I think it was our view it didn't
12:54:47PM 25 matter. We weren't going to be relying -- he didn't offer any

12:54:50PM 1 new facts regarding the issues that are addressed in that, so
12:54:53PM 2 we are ready to do it now if that's appropriate.

12:54:56PM 3 MR. PFEIFFER: And we are as well, and I think it may
12:54:59PM 4 be appropriate, Your Honor, only because Mr. Tucker is going to
12:55:02PM 5 immediately follow Dr. Shapiro, and this would have potentially
12:55:07PM 6 great relevance to the scope --

12:55:09PM 7 THE COURT: You don't have any cross-examination for
12:55:11PM 8 Dr. Shapiro?

12:55:13PM 9 MR. PFEIFFER: He's going to follow after I'm done,
12:55:15PM 10 too, Your Honor.

12:55:16PM 11 THE WITNESS: Good.

12:55:17PM 12 THE COURT: You thought you were out of here, didn't
12:55:19PM 13 you?

12:55:20PM 14 THE WITNESS: Good try.

12:55:23PM 15 THE COURT: How are we are in the court reporter
12:55:29PM 16 department?

12:55:31PM 17 MR. POMERANTZ: Your Honor, Mr. Dane will be arguing
12:55:34PM 18 the lost profits -- we can do it now --

12:55:38PM 19 THE COURT: Dr. Shapiro can step down and go have
12:55:42PM 20 lunch if he'd like to. As a general rule, you can't discuss
12:55:46PM 21 your testimony or the facts with anybody other than the lawyers
12:55:50PM 22 in the case.

12:55:51PM 23 THE WITNESS: Yes, sir.

12:56:03PM 24 THE COURT: All right. I think structurally we
12:56:06PM 25 agreed that on this issue, this will be a Rule 50 motion,

12:56:15PM 1 because I did or have considered the trial testimony, and both
12:56:20PM 2 sides are agreeable to that procedural construct, and that
12:56:23PM 3 means, then, that the defendant has the first go.

12:56:28PM 4 MR. PFEIFFER: Thank you, Your Honor. May I proceed,
12:56:40PM 5 Your Honor?

12:56:40PM 6 THE COURT: Please.

12:56:41PM 7 MR. PFEIFFER: Under Rule 50, the issue is really
12:56:45PM 8 still the same as it has always been as we've been considering
12:56:49PM 9 this question: Can a plaintiff in an antitrust case get to a
12:56:53PM 10 jury with a multi-million-dollar damages claim based on
12:56:57PM 11 injuries that everybody agrees have not happened yet, may never
12:57:01PM 12 happen, and will depend on the outcome of several speculative
12:57:05PM 13 contingent --

12:57:07PM 14 THE COURT: Let's don't overstate the case here.
12:57:09PM 15 There is evidence in the record that foreign imports are
12:57:20PM 16 unlikely to restore competition or to provide the quantity that
12:57:26PM 17 Steves needs and that the cost of building the plant -- the
12:57:34PM 18 question is whether there's evidence that the cost of building
12:57:37PM 19 the plant is beyond Steves' means.

12:57:40PM 20 And it's not likely -- there's not anything likely to
12:57:44PM 21 happen by 2021 that will change the circumstances that we have
12:57:50PM 22 now. And, in fact, if you ever wanted any confirmation of
12:57:54PM 23 that, Dr. Shapiro just provided a basis for the jury to
12:57:59PM 24 conclude those things as well as the factual basis. I don't
12:58:06PM 25 know that everybody agrees they may never happen.

12:58:12PM 1 MR. PFEIFFER: Your Honor, I don't think I am
12:58:15PM 2 overstating it --

12:58:16PM 3 THE COURT: Maybe we just say it this way: I think
12:58:19PM 4 you're overstating it, so try to get me in the evidentiary
12:58:22PM 5 posture that I can analyze it correctly, or an argument
12:58:28PM 6 posture.

12:58:28PM 7 MR. PFEIFFER: Yes, Your Honor. I think the evidence
12:58:30PM 8 that has come in still relies, to an impermissible degree under
12:58:36PM 9 the case law, under the Rule 50 case law, on speculation about
12:58:40PM 10 future events and on contingent events that have to happen in
12:58:44PM 11 the future for there to be a viable damages claim.

12:58:49PM 12 THE COURT: What are the future?

12:58:50PM 13 MR. PFEIFFER: So the future events, first, there are
12:58:53PM 14 multiple steps. One is, will Steves and Jeld-Wen work out a
12:58:56PM 15 new deal sometime in the next three, over three and a half
12:58:59PM 16 years.

12:59:00PM 17 THE COURT: The jury could conclude on the basis of
12:59:02PM 18 the record here they will not; do you think yes or no?

12:59:06PM 19 MR. PFEIFFER: No, Your Honor. I think the jury
12:59:07PM 20 would have to speculate on what future contingencies will bear
12:59:11PM 21 out in that regard.

12:59:13PM 22 Second step, even if Jeld-Wen and Steves were not to
12:59:16PM 23 work out a new deal, would Steves and Masonite work out a new
12:59:21PM 24 deal sometime in the next 3.75 years. And that one --

12:59:28PM 25 THE COURT: What evidence is there that they would?

12:59:31PM 1 You have this guy Lynch, he and -- does everybody in the
12:59:36PM 2 business have cowboys as heads of their companies? He said, in
12:59:42PM 3 words of one syllable, I'm not going to sell to them except on
12:59:46PM 4 the spot market, and I'll do it if I have the capacity or not.

12:59:50PM 5 MR. PFEIFFER: Which Professor Shapiro said capacity
12:59:52PM 6 is well below --

12:59:55PM 7 THE COURT: And if I don't have the capacity, you're
12:59:57PM 8 still not going to sell to them according to his deposition
01:00:00PM 9 testimony.

01:00:01PM 10 MR. PFEIFFER: Which is a contingency, the answer
01:00:03PM 11 to which we don't --

01:00:04PM 12 THE COURT: That's always a contingency. You see,
01:00:06PM 13 the problem with your whole argument is you are trying to make
01:00:08PM 14 contingencies out of everything when the evidence that you have
01:00:13PM 15 doesn't make it contingent. That's what I'm trying to
01:00:17PM 16 understand, why you say each one of these alternatives is, in
01:00:22PM 17 fact, contingent.

01:00:24PM 18 MR. PFEIFFER: Respectfully, Your Honor, I have to
01:00:25PM 19 disagree with what you just said. Each is contingent under the
01:00:29PM 20 evidence as it came in.

01:00:30PM 21 THE COURT: Don't argue that. I don't want to hear
01:00:33PM 22 that conclusion. I want you to explain it to me. You keep
01:00:38PM 23 saying the same conclusory argument, and it doesn't help me to
01:00:42PM 24 have you repeat it. I don't need to even hear you, because
01:00:45PM 25 I've read your papers.

01:00:47PM 1 What I need to hear from you is how you deal with the
01:00:49PM 2 evidence on the points so I can understand the structure of
01:00:52PM 3 your position.

01:00:53PM 4 MR. PFEIFFER: So let's take them -- I think it was
01:00:57PM 5 Steves' counsel who put it into four categories. Let's take
01:01:00PM 6 those four categories and look at what the evidence was that
01:01:03PM 7 came in at the trial. Start with Jeld-Wen as an option. Sam
01:01:07PM 8 Steves testified he admitted he does not know whether Jeld-Wen
01:01:11PM 9 will sell it door skins after September 10th, 201. That's the
01:01:16PM 10 transcript of this trial at 439, lines 14 to 17.

01:01:20PM 11 Sam Steves admitted it is possible, still, that they
01:01:22PM 12 could sign a new supply agreement with Jeld-Wen, transcript
01:01:27PM 13 438, lines three through five. Sam Steves admitted it would
01:01:30PM 14 not turn down a contract with Jeld-Wen if they could agree with
01:01:33PM 15 each other on reasonable terms, transcript 438, line six
01:01:38PM 16 through eight.

01:01:39PM 17 Let's turn to Masonite. I think it's uncontradicted
01:01:45PM 18 that Masonite says it's willing to sell to Steves right now at
01:01:50PM 19 list prices. Steves has testified, through Sam Steves, that it
01:01:56PM 20 doesn't know what price it could pay to a supplier and still be
01:02:00PM 21 profitable in 2021 and beyond. So at this point, there's no
01:02:04PM 22 way to look at what the prices might be for Masonite and say
01:02:07PM 23 that they would be unfeasible, even at list. That's at 439, 11
01:02:14PM 24 through 16.

01:02:14PM 25 While Sam Steves said that buying on the spot market

01:02:17PM 1 was not what they want to do, the evidence is that they've done
01:02:20PM 2 it before in millions of skins of volume, including with
01:02:23PM 3 Masonite and CMI. And that's trial transcript at 425, lines
01:02:30PM 4 nine through 17 and also one of the exhibits they used.

01:02:35PM 5 Foreign supply, Sam Steves has testified that Steves
01:02:39PM 6 is still exploring the option of buying from companies in Asia
01:02:42PM 7 and Europe. That's the trial transcript at 443, line 16
01:02:47PM 8 through 18.

01:02:49PM 9 Steves and Teverpan are negotiating a supply
01:02:51PM 10 agreement as recently as December of 2017, and they don't know
01:02:55PM 11 what the outcome of those negotiations will be. That's at 451,
01:02:59PM 12 lines nine through ten. Prior to 2012, prior to the merger,
01:03:05PM 13 Sam Steves admitted that Steves, itself, bought interior molded
01:03:09PM 14 door skins from foreign suppliers. So it is feasible to do so.
01:03:13PM 15 They've done it in the past. They're negotiating to do it at
01:03:16PM 16 future. That's at trial transcript 442, line 23, through 443,
01:03:21PM 17 line one.

01:03:22PM 18 You saw the evidence from Mr. Ambruz and Mr. Wysock
01:03:26PM 19 about having supply options at all three Turkish suppliers.
01:03:30PM 20 That's 447, lines five through seven. Teverpan indicated it
01:03:35PM 21 was willing to expand and add new molds and dies, 454, 21
01:03:41PM 22 through 23. There's extensive Kastamonu testimony about them
01:03:47PM 23 having been willing or interested in selling doors to Steves
01:03:50PM 24 for more than a year, 459, 23, through 460, line one. And
01:03:55PM 25 Kastamonu, as we heard, already has a presence and a facility

01:03:59PM 1 producing wood chips which are an input into door skins in the
01:04:03PM 2 United States in Florida.

01:04:05PM 3 THE COURT: They don't make the skins in the United
01:04:07PM 4 States.

01:04:07PM 5 MR. PFEIFFER: No, but they're interested, as Mr.
01:04:10PM 6 Steves testified at 467 and 469 of the transcript, they're
01:04:14PM 7 interested in building a door skin facility in the United
01:04:18PM 8 States.

01:04:18PM 9 As to Proteak, I think testimony on that one in terms
01:04:24PM 10 of building a facility, testimony on that, it was a highly
01:04:29PM 11 interested partner, they were an MDF, medium density fiber
01:04:35PM 12 board maker, which Sam Steves identified as the ideal
01:04:39PM 13 manufacturing partner. Sam Steves testified that they held
01:04:40PM 14 them in high regard and testified that that deal broke down
01:04:44PM 15 over deal structure, not any concerns about the viability of
01:04:47PM 16 the project or the profitability of the project.

01:04:50PM 17 Sam Steves testified that Proteak cooled to the idea
01:04:54PM 18 of a partnership after Steves balked at a 33 percent share of
01:04:59PM 19 the project, because Proteak wanted to contribute more money to
01:05:03PM 20 the project than Steves was interested in. That doesn't show
01:05:05PM 21 lack of feasibility. That, in fact, shows feasibility but a
01:05:09PM 22 choice of different deal terms, and that's, among others
01:05:12PM 23 places, transcript at 510, 11 through 16.

01:05:17PM 24 The Dieffenbacher evidence indicated that a plant
01:05:19PM 25 could be built in less than two years, transcript at 498, seven

01:05:24PM 1 through 24. And, Your Honor, after hearing the testimony of
01:05:29PM 2 Sam Steves -- that's not all the testimony of Sam Steves, but
01:05:33PM 3 I'm trying to be brief here, you commented -- you asked as to
01:05:37PM 4 Edward Steves, is he going to testify about why the options
01:05:41PM 5 aren't viable. The other witness, referring to Sam Steves,
01:05:44PM 6 didn't. You said, he didn't say why they can't do it. That's
01:05:48PM 7 at pages 687, 688 of the transcript.

01:05:52PM 8 Mr. Steves, with counsel having that admonition in
01:05:57PM 9 mind, then got up and testified. What did he say about
01:05:59PM 10 Jeld-Wen? Let's go through the four options again. He
01:06:02PM 11 admitted Steves doesn't know even who will be the management of
01:06:05PM 12 Jeld-Wen come 2021. They could have a different view of
01:06:08PM 13 supplying Steves under different management, again a
01:06:11PM 14 contingency yet to be realized.

01:06:14PM 15 And he admitted that Jeld-Wen has expressed interest
01:06:17PM 16 already in entering into a new long-term agreement with Steves
01:06:20PM 17 on terms that make good economic sense.

01:06:23PM 18 THE COURT: How do you assess this contingency issue
01:06:28PM 19 if you take the view that there is evidence that a jury, a
01:06:36PM 20 finder of the fact, could reject every one of your theories and
01:06:40PM 21 find that these things are about as likely to happen as --
01:06:49PM 22 they're just not likely to happen at all? If one assesses the
01:06:55PM 23 evidence and the jury could conclude that, then what does that
01:06:59PM 24 do to your contingency argument?

01:07:03PM 25 MR. PFEIFFER: Nothing under the case law, Your

01:07:05PM 1 Honor. If they have to project out the results of
01:07:09PM 2 contingencies that have not happened, and however the
01:07:11PM 3 likelihood may not happen, the case law says they cannot base a
01:07:15PM 4 verdict on that basis. Again, that's true under Rule 50, not
01:07:19PM 5 just 56. We haven't cited Rule 50 in a while.

01:07:23PM 6 THE COURT: No. You did not assume what I asked you,
01:07:26PM 7 and that is that a jury could find those things are not going
01:07:31PM 8 to happen, and, therefore, then what happens in this case? If
01:07:37PM 9 a jury could your view of this is just wrong, what then
01:07:43PM 10 happens?

01:07:43PM 11 MR. PFEIFFER: I'm not sure what to say other than
01:07:46PM 12 reversal on appeal. The question can't go to the jury, Your
01:07:50PM 13 Honor.

01:07:50PM 14 THE COURT: I didn't make my question very clear. I
01:07:53PM 15 don't think I put that that way, but they don't agree with your
01:07:56PM 16 predicate that these four alternatives -- they agree they're
01:08:03PM 17 not likely to happen. What does that do to the lost profits
01:08:09PM 18 analysis?

01:08:10PM 19 MR. PFEIFFER: That is my point, Your Honor.
01:08:12PM 20 Nothing. The fact that they --

01:08:13PM 21 THE COURT: Why not? And no case law. Tell me
01:08:16PM 22 logically -- I understand the law. I want to know what your
01:08:19PM 23 theory is tied to this case.

01:08:22PM 24 MR. PFEIFFER: Because logically, the most the
01:08:24PM 25 evidence would say, viewed most favorably, was that Steves does

01:08:27PM 1 not think it's likely, but there's no reasonable certainty that
01:08:33PM 2 these outcomes, each of these predicate steps will work out the
01:08:37PM 3 way it has to for Steves to suffer this injury. And the jury
01:08:41PM 4 can't close that gap and take it from, we don't think it's
01:08:44PM 5 likely to it is a reasonable certainty.

01:08:50PM 6 THE COURT: You mentioned does the evidence permit a
01:08:52PM 7 finding to a reasonable certainty that these alternatives would
01:08:55PM 8 not happen; is that what you are saying?

01:08:57PM 9 MR. PFEIFFER: Yes, Your Honor.

01:08:58PM 10 THE COURT: Let's assume for the moment that a jury
01:09:02PM 11 can find, to a reasonable certainty, that these events will --
01:09:07PM 12 these alternatives will not come to a pass. We submit it to
01:09:12PM 13 them on a special interrogatory, and they say, we find to a
01:09:16PM 14 reasonable degree of certainty this isn't going to happen, this
01:09:20PM 15 isn't going to happen. Then where do we go with the lost
01:09:24PM 16 profits points?

01:09:24PM 17 MR. PFEIFFER: Are you asking me procedurally? I
01:09:28PM 18 apologize, Your Honor. I'm not understanding the question
01:09:29PM 19 because I'm not supposed to address the law, and the facts are
01:09:32PM 20 contrary to that, so I'm not quite sure how to answer your
01:09:35PM 21 question.

01:09:38PM 22 THE COURT: Do you want to think about that a little
01:09:40PM 23 bit?

01:09:40PM 24 MR. PFEIFFER: I honestly don't know what you want me
01:09:43PM 25 to say. Are you saying Mr. Tucker --

01:09:45PM 1 THE COURT: I want you to get to the bottom line
01:09:47PM 2 issue here that the theory -- the lost profits is predicated on
01:09:55PM 3 them going out of business, and the contingencies are only a
01:10:00PM 4 step to the going out of business. That's what I'm trying to
01:10:05PM 5 get you to address, and that's what I thought your whole theory
01:10:08PM 6 was in your papers, is that the big apple here is that the --
01:10:17PM 7 that the lost profits is predicated on is not the four
01:10:22PM 8 individual things that may or may not happen. It is that even
01:10:28PM 9 if you assume that all of those things happen, don't happen,
01:10:34PM 10 you still can't reach the conclusion -- a jury can't reach the
01:10:37PM 11 conclusion that they would go out of business, and I haven't
01:10:40PM 12 heard anything about that being the central point of your
01:10:43PM 13 papers.

01:10:43PM 14 MR. PFEIFFER: That's certainly true, Your Honor. It
01:10:45PM 15 is both. We are saying that even if they could establish all
01:10:49PM 16 four of those predicates, they don't have a basis to say that
01:10:52PM 17 they will go out of business.

01:10:54PM 18 THE COURT: Let's assume that the jury has now
01:10:56PM 19 answered those four questions and answered them against you,
01:11:00PM 20 that, in fact, these contingencies will not come in and provide
01:11:05PM 21 an alternative.

01:11:06PM 22 MR. PFEIFFER: Yes, Your Honor.

01:11:08PM 23 THE COURT: What evidence is there, then, about them
01:11:11PM 24 going out of business?

01:11:13PM 25 MR. PFEIFFER: I don't believe there's any evidence

01:11:14PM 1 whatsoever about them going out of business.

01:11:16PM 2 THE COURT: Who testified that they would go out of
01:11:19PM 3 business?

01:11:19PM 4 MR. PFEIFFER: No witness so far in this case, Your
01:11:23PM 5 Honor. There's absence of evidence of that.

01:11:25PM 6 THE COURT: Thank you. I think I understand your
01:11:27PM 7 point.

01:11:28PM 8 MR. PFEIFFER: Okay, Your Honor. Do you want to hear
01:11:30PM 9 more, or should I sit down?

01:11:32PM 10 THE COURT: I don't know I need any more. That's the
01:11:34PM 11 nubbin of the whole case, it seems to me. All right, Mr. Dane.
01:11:42PM 12 I mean of the whole case on future lost profits.

01:11:47PM 13 Your future lost profits claim is based on the
01:11:50PM 14 predicate that Steves will go out of business because there's
01:11:53PM 15 not going to be a source of supply; right?

01:11:55PM 16 MR. DANE: That is correct, Your Honor.

01:11:56PM 17 THE COURT: Who testified to that, and who said what
01:11:58PM 18 about it?

01:11:59PM 19 MR. DANE: Your Honor, we had understood from your
01:12:03PM 20 statements at the outset of the case that our witnesses were
01:12:07PM 21 not to tell the jury before we had had this discussion about
01:12:10PM 22 the lost profits issues, that Steves would go out of business,
01:12:14PM 23 so we did not ask them that ultimate question.

01:12:16PM 24 They did testify that Steves would not have options
01:12:20PM 25 and they would not be able --

01:12:22PM 1 THE COURT: Who is going to testify if I tell you to
01:12:25PM 2 put them on the stand after lunch? What are they going to say
01:12:28PM 3 about going out of business? They didn't say it here. I don't
01:12:32PM 4 think I told you to do it that way, but if I did, I'm stuck
01:12:36PM 5 with it.

01:12:37PM 6 Given that that was your whole theory, I can't
01:12:40PM 7 imagine you wouldn't have put that evidence on, and the issue
01:12:44PM 8 was -- we were keeping out was not that they weren't going out
01:12:48PM 9 of business or that they were but whether these conditions were
01:12:54PM 10 sufficient to cause them to go out of business.

01:12:57PM 11 MR. DANE: Yes, Your Honor.

01:12:58PM 12 THE COURT: And that's different than whether they
01:13:00PM 13 were going out of business. So I haven't heard anybody say
01:13:03PM 14 that if all these things come to pass, we're going out of
01:13:06PM 15 business.

01:13:07PM 16 MR. DANE: That's correct, Your Honor. If we
01:13:10PM 17 misunderstood, then I apologize in terms of how we limited our
01:13:12PM 18 examination, but let me speak to that point. There is
01:13:15PM 19 certainly evidence in the record on that point. We don't think
01:13:18PM 20 it's actually very controversial.

01:13:20PM 21 Mr. Tucker has expressed an opinion. On the first
01:13:22PM 22 point about all the contingencies, he's not expressing an
01:13:26PM 23 opinion. He's making an assumption. He understands the jury
01:13:28PM 24 will decide the issue of those contingencies.

01:13:30PM 25 On the separate question of if Steves cannot get door

01:13:33PM 1 skins, can they serve, can they remain in business, he has
01:13:37PM 2 expressed an opinion. He has reviewed the financial statements
01:13:40PM 3 of Steves, and he has expressed the opinion they could not
01:13:43PM 4 remain in business, because the only product that they sell
01:13:45PM 5 that makes any money are molded door skins.

01:13:48PM 6 So it's almost -- it seems self-evident to us that if
01:13:52PM 7 their one profit-generating product is not available to them,
01:13:56PM 8 they will go out of business.

01:13:56PM 9 THE COURT: If I deny the motion at this stage, is
01:14:02PM 10 your only evidence on this point going to be from Mr. Snyder?
01:14:10PM 11 I mean Tucker.

01:14:11PM 12 MR. DANE: Yes, Your Honor.

01:14:12PM 13 THE COURT: Is it going to be from Mr. Tucker?

01:14:15PM 14 MR. DANE: Yes.

01:14:15PM 15 THE COURT: You're not going to put any other
01:14:18PM 16 evidence on.

01:14:18PM 17 MR. DANE: Well, Your Honor, if Your Honor -- Mr.
01:14:22PM 18 Tucker has relied on review of the financial statements and the
01:14:26PM 19 information that was provided to him by the Steves. If we
01:14:30PM 20 needed to recall the Steves, if this were actually an issue of
01:14:34PM 21 debate -- I really don't know that it is, because the other
01:14:37PM 22 product lines Steves has lose money. It seems to us pretty
01:14:40PM 23 self-evident that the business is going --

01:14:43PM 24 THE COURT: Nobody testified that the other products,
01:14:53PM 25 all the other product lines lose money, have they?

01:14:56PM 1 MR. DANE: No, Your Honor. We understood that we
01:14:58PM 2 needed to await discussion of this issue before we put on
01:15:00PM 3 evidence of that specifically, although it is in Mr. Tucker's
01:15:04PM 4 report, and he's prepared to testify to it today.

01:15:07PM 5 THE COURT: Basically you just need Tucker to testify
01:15:10PM 6 is what it boils down to?

01:15:13PM 7 MR. DANE: That's right, Your Honor.

01:15:16PM 8 THE COURT: On the fact they will go out of business.

01:15:19PM 9 MR. DANE: Yes.

01:15:19PM 10 THE COURT: Go ahead. I understand.

01:15:23PM 11 MR. DANE: Your Honor, I won't belabor the other
01:15:26PM 12 points. We do agree with Your Honor on the issues of the
01:15:29PM 13 various contingencies. There certainly has been abundant
01:15:31PM 14 evidence in the record from which this jury could conclude that
01:15:34PM 15 none of those are reasonably likely.

01:15:36PM 16 We have -- the most compelling evidence on many of
01:15:40PM 17 these issues are the contemporaneous internal documents --

01:15:44PM 18 THE COURT: Mr. Pfeiffer said that the test wasn't
01:15:48PM 19 whether they were reasonably likely. It's whether there was a
01:15:51PM 20 reasonable -- you could have a finding to a reasonable
01:15:55PM 21 certainty that these alternatives would not occur. Isn't that
01:16:02PM 22 what you were urging, Mr. Pfeiffer?

01:16:03PM 23 MR. PFEIFFER: Yes, it was, Your Honor.

01:16:05PM 24 THE COURT: Before you could get to the next point,
01:16:07PM 25 all right. So could a jury do that?

01:16:13PM 1 MR. DANE: Yes, Your Honor.

01:16:14PM 2 THE COURT: Is that the proper standard?

01:16:16PM 3 MR. DANE: Well, Your Honor, the case law use that
01:16:21PM 4 phrase, reasonable certainty.

01:16:23PM 5 THE COURT: Yes, it does. Pretty good basis to find
01:16:27PM 6 the standard unless you have something else, it seems to me.

01:16:31PM 7 MR. DANE: I'm not disputing it's the standard, Your
01:16:33PM 8 Honor. I do think that the phrase is not as precise as it
01:16:38PM 9 might be in that there's also case law that makes very clear
01:16:41PM 10 that when the law is referring to reasonable certainty, it's
01:16:45PM 11 understood it's not talking about scientific precision, it's
01:16:48PM 12 not talking about something that's 100 percent certain, and
01:16:50PM 13 that's mainly what Mr. Pfeiffer's argument was directed to.

01:16:53PM 14 He raised arguments to suggest that we can't prove to
01:16:57PM 15 an absolute certainty that none of these options would be
01:17:00PM 16 available in 2021. We don't dispute that.

01:17:03PM 17 THE COURT: I thought he was saying reasonable
01:17:05PM 18 certainty. I don't think he said absolute certainty. He may
01:17:09PM 19 have said it early on, but he retrenched to reasonable
01:17:13PM 20 certainty when he was making his argument, because that's the
01:17:15PM 21 standard in the case law.

01:17:17PM 22 MR. DANE: And we do think, Your Honor, that there's
01:17:19PM 23 abundant evidence in the record from which this jury can take
01:17:22PM 24 each of those separate options that have been raised and can
01:17:25PM 25 reasonably evaluate each one of them, decide that they are all

01:17:30PM 1 extremely unlikely, and, therefore, that the most likely
01:17:35PM 2 result, to a reasonable certainty, is that in 2021 when the
01:17:38PM 3 Jeld-Wen long-term supply agreement expires, Steves will be
01:17:42PM 4 left with no source of supply, very consistent with what some
01:17:46PM 5 of the internal documents we've seen from Jeld-Wen themselves
01:17:48PM 6 contemplate and understand, including documents that say, if we
01:17:52PM 7 stop selling to Steves, Masonite has already announced they're
01:17:56PM 8 not going to sell, would they pick up the sales? Probably not.

01:18:01PM 9 Jeld-Wen understands what would happen, and all of
01:18:03PM 10 this is litigation-created arguments about unlikely scenarios.
01:18:09PM 11 We've seen in all the internal information and all the internal
01:18:13PM 12 documents, how difficult it is to build a plant, how difficult
01:18:17PM 13 it would be to get foreign supply. The fact that Jeld-Wen has
01:18:21PM 14 internal documents wanting to kill off Steves, the fact that
01:18:24PM 15 Masonite has announced that it doesn't want to sell to its
01:18:27PM 16 competitors, that it won't enter into long-term supply
01:18:30PM 17 agreements, from this evidence we think that certainly the jury
01:18:33PM 18 could very reasonably determine that none of these supposed
01:18:37PM 19 options that have been thrown out are reasonably likely and
01:18:41PM 20 that the reasonable certainty is that in 2021, Steves will be
01:18:46PM 21 without any source of supply. And then the question is,
01:18:49PM 22 without that source of supply, could they survive. Mr. Tucker
01:18:53PM 23 will be able to testify that they could not.

01:18:56PM 24 THE COURT: Why is it appropriate to base that
01:18:58PM 25 judgment on what Mr. Tucker says?

01:19:01PM 1 MR. PFEIFFER: Sorry, Your Honor, I'll wait my term.

01:19:07PM 2 There's a misunderstanding, I think, but I'll address it later.

01:19:12PM 3 THE COURT: Why is it appropriate to base that

01:19:14PM 4 judgment on what Mr. Tucker says? In other words, why don't

01:19:17PM 5 you to have some evidence in the record that we make these

01:19:22PM 6 things; of those things, here are two lines and the other lines

01:19:27PM 7 that we have, and they're not profitable, and we can't sell

01:19:34PM 8 enough door skins with the alternate source of supply without a

01:19:40PM 9 plant to stay in business? Why don't you have to have some

01:19:45PM 10 evidence like that?

01:19:47PM 11 MR. DANE: Mr. Tucker did -- he based his opinion

01:19:50PM 12 that was in his report about Steves not being able to remain in

01:19:54PM 13 business upon both discussions with the Steves and also his

01:19:59PM 14 analysis of the financial statements of the company, and that

01:20:02PM 15 included analysis of the profitability of the various product

01:20:06PM 16 lines. And based upon that analysis, he concluded that all of

01:20:11PM 17 the profits for the company are attributable to molded door

01:20:15PM 18 skins.

01:20:16PM 19 And so if his assumption --

01:20:18PM 20 THE COURT: Right, okay, I got you. Stop there for a

01:20:22PM 21 minute. The undisputed record here is that Teverpan, or from

01:20:27PM 22 Europe, the Middle East, you can get three of the models, three

01:20:34PM 23 out of 20 designs. What is the evidence in the record about

01:20:38PM 24 what that will yield in terms of an ongoing business? Is there

01:20:44PM 25 anything in there that tells me that?

01:21:09PM 1 MR. POWELL: Your Honor, may I confer with Mr. Dane?

01:21:13PM 2 THE COURT: Sure.

01:21:13PM 3

01:21:14PM 4 (Counsel conferring.)

01:21:37PM 5

01:21:37PM 6 MR. DANE: Your Honor, I'm looking for particular
01:21:40PM 7 citations, but there was evidence given by Mr. Steves, also Mr.
01:21:47PM 8 Ambruz, and I believe also by Mr. Lynch, that in order for
01:21:50PM 9 someone to be viable as a door manufacturer, you can't just
01:21:56PM 10 have the limited number of models. You have to have a broad
01:21:59PM 11 array of the number of models that are being offered.

01:22:02PM 12 Mr. Edward Steves -- this I specifically recall
01:22:05PM 13 because I asked him about it. If Your Honor will remember, on
01:22:09PM 14 the Madison and Monroe styles, those were styles that Steves
01:22:13PM 15 was purchasing at a loss, and even though they were purchasing
01:22:17PM 16 them at a loss, they still did it because Mr. Steves testified
01:22:22PM 17 this is what our customers demand, and a Home Depot is not
01:22:26PM 18 going to buy from you if you say we can give you five percent
01:22:29PM 19 of the offerings.

01:22:30PM 20 THE COURT: Sam Steves said he had 477, and there
01:22:34PM 21 were only 20 available from Europe and his customer line
01:22:39PM 22 required that.

01:22:40PM 23 MR. DANE: Yes.

01:22:41PM 24 THE COURT: But there's no evidence about what the
01:22:42PM 25 rest of the industry requires or whether that's what's required

01:22:46PM 1 for survivability. That's what's required for their
01:22:49PM 2 profitability, it seems to me. That's where the record is. Am
01:22:54PM 3 I wrong about that?

01:22:55PM 4 MR. DANE: The evidence, Your Honor, is I believe
01:22:58PM 5 that for Steves to be able to be competitive and service its
01:23:02PM 6 customers, including the retail customers such as Home Depot,
01:23:05PM 7 it needs that full range of designs.

01:23:07PM 8 We know that Jeld-Wen, obviously, does have that full
01:23:12PM 9 range designs. I don't recall if Mr. Lynch testified to
01:23:16PM 10 exactly the number of designs that Masonite has. I know he did
01:23:20PM 11 testify he agreed with the proposition that in order to be
01:23:24PM 12 competitive, a door company has to have a broad range of
01:23:28PM 13 designs. I don't think he put a number on it.

01:23:30PM 14 That's the state of the evidence. There has been no
01:23:32PM 15 evidence that there are specialty shops, for example, that only
01:23:36PM 16 sell two or three types of door skin designs. All the evidence
01:23:41PM 17 in the record is that those of the companies that are
01:23:43PM 18 competitive have a broad array of designs they offered to the
01:23:46PM 19 customers.

01:23:46PM 20 THE COURT: In order to be competitive?

01:23:48PM 21 MR. DANE: Yes.

01:23:49PM 22 THE COURT: All right, thank you. Mr. Pfeiffer, do
01:23:51PM 23 you have anything else, sir?

01:23:52PM 24 MR. PFEIFFER: Yes, Your Honor, please. I want to
01:23:59PM 25 address the issue of Mr. Tucker, because, again, I think

01:24:02PM 1 there's a misunderstanding about what he actually did and
01:24:05PM 2 didn't do in his reports. In his first report --

01:24:09PM 3 THE COURT: Excuse me. I have these excerpts up here
01:24:13PM 4 that you all gave me. Are they in the excerpts that you can
01:24:20PM 5 help me out with?

01:24:21PM 6 MR. PFEIFFER: Actually, I think the excerpts are
01:24:24PM 7 actually from the evidence, so this is not in evidence.

01:24:26PM 8 THE COURT: I have a report, a report, a report,
01:24:31PM 9 proffer of amendment, report of Kaplan, report of Kaplan,
01:24:35PM 10 proffer --

01:24:36PM 11 MR. PFEIFFER: Might we approach and give you a
01:24:38PM 12 copy -- it might be easier -- of the whole set of reports of
01:24:42PM 13 Mr. Tucker?

01:24:51PM 14 THE COURT: Thank you. What page?

01:24:57PM 15 MR. PFEIFFER: If you start with the first report,
01:24:58PM 16 there's a couple different places to look. Start with the
01:25:01PM 17 first report and go to page ten, paragraph 36, under the
01:25:06PM 18 heading D, Steves' future lost profits damages.

01:25:09PM 19 THE COURT: Wait just a minute. Sorry, I had the
01:25:14PM 20 wrong page ten. Ten what?

01:25:16PM 21 MR. PFEIFFER: Ten, paragraph 36, right under heading
01:25:19PM 22 D which should say Steves' future lost profits damages.

01:25:23PM 23 THE COURT: Yes.

01:25:25PM 24 MR. PFEIFFER: You'll see there that he's summarizing
01:25:28PM 25 his conclusion, and he says, even if Jeld-Wen does not

01:25:32PM 1 terminate the supply agreement until September 10th, 2021, I
01:25:37PM 2 understand that if Jeld-Wen, thereafter -- refuses thereafter
01:25:41PM 3 to sell door skins to Steves at competitive prices --

01:25:46PM 4 THE COURT: Wait a minute. Even if Jeld-Wen does not
01:25:49PM 5 terminate the supply agreement until September 10, 2021, I
01:25:54PM 6 understand that if Jeld-Wen refuses thereafter to sell door
01:25:57PM 7 skins to Steves at competitive prices and Steves has no other
01:26:01PM 8 viable source of door skins, Steves will be forced out of
01:26:05PM 9 business.

01:26:06PM 10 MR. PFEIFFER: Yes, and he says there, he understands
01:26:08PM 11 that. He doesn't say he did an analysis of that. If you page
01:26:12PM 12 forward to page 24 in the same report where he gets into more
01:26:21PM 13 detail about his lost profits analysis under Roman VI --

01:26:25PM 14 THE COURT: I got it. What paragraph?

01:26:27PM 15 MR. PFEIFFER: Paragraph 75, please. It's the second
01:26:31PM 16 sentence.

01:26:31PM 17 THE COURT: I understand Steves' view; is that right?

01:26:33PM 18 MR. PFEIFFER: Yes, Your Honor, that's the one.

01:26:34PM 19 THE COURT: Is that if we cannot secure -- if it
01:26:38PM 20 cannot secure an alternative source of supply by December 31,
01:26:43PM 21 2019, and Jeld-Wen stops supplying it with door skins at
01:26:47PM 22 competitive prices as of that date, it will be unable to
01:26:50PM 23 continue manufacturing and selling interior molded doors. That
01:26:55PM 24 addresses the alternate date which I thought you all withdrew.

01:26:59PM 25 MR. PFEIFFER: Sorry. We did withdraw that, Your

01:27:02PM 1 Honor. Then if you go down immediately below that, he's just
01:27:04PM 2 stating again his understanding. Go down to paragraph 76, the
01:27:10PM 3 first sentence. You'll see there he says based on the
01:27:22PM 4 foregoing, I have assumed that if Jeld-Wen does not have --

01:27:26PM 5 THE COURT: What is your point?

01:27:28PM 6 MR. PFEIFFER: That he did not render an opinion that
01:27:36PM 7 Steves would go out of business in his reports, and I have a
01:27:39PM 8 cite in the second report as well --

01:27:42PM 9 THE COURT: Wait a minute. Where, Mr. Dane, does he
01:27:45PM 10 render an opinion that they're going out of business? He's
01:27:48PM 11 challenging you on that, so tell me where Mr. Tucker makes that
01:27:57PM 12 opinion, and then we can crystalize the argument, maybe get
01:28:00PM 13 some lunch.

01:28:01PM 14 MR. DANE: Yes, Your Honor.

01:28:06PM 15 THE COURT: Let's see if we've got this issue, or
01:28:10PM 16 else am I dealing with this as you've posited it. Do you have
01:28:14PM 17 any other testimony on the topic other than what Mr. Pfeiffer
01:28:17PM 18 has pointed to, Mr. Dane?

01:28:18PM 19 MR. DANE: I do, Your Honor.

01:28:20PM 20 THE COURT: What page and what report? I've got them
01:28:22PM 21 all up here now.

01:28:24PM 22 MR. DANE: So it's both in Mr. Tucker's -- one of his
01:28:27PM 23 report and then in his deposition testimony.

01:28:29PM 24 THE COURT: First let's take the report.

01:28:31PM 25 MR. DANE: In the reply report dated May 5th, 2017.

01:28:35PM 1 THE COURT: May 5th, okay. What page?

01:28:38PM 2 MR. DANE: Page 17.

01:28:40PM 3 THE COURT: Page 17?

01:28:41PM 4 MR. DANE: Yes.

01:28:43PM 5 THE COURT: Mr. Kaplan's opinion regarding Steves'
01:28:46PM 6 ability to operate by offering only flush doors, et cetera?

01:28:50PM 7 MR. DANE: Yes, Your Honor.

01:28:51PM 8 THE COURT: Where in there?

01:28:53PM 9 MR. DANE: To give -- so in paragraph 51, Mr.

01:29:00PM 10 Tucker -- so Mr. Kaplan took issue with the question of whether
01:29:03PM 11 Steves would go out of business if it couldn't sell molded door
01:29:07PM 12 skins, and he pointed to the other product line, and he said,
01:29:11PM 13 perhaps Steve could stay in business with the other business
01:29:14PM 14 lines.

01:29:14PM 15 Responding to that, Mr. Tucker, in paragraph 51,
01:29:17PM 16 stated that with respect to exterior doors, which is one of
01:29:20PM 17 those other product lines, that that business is unprofitable
01:29:23PM 18 and serves as a loss leader, and he did an evaluation of those
01:29:28PM 19 two other product lines which have separate names.

01:29:31PM 20 There's a Crestmill door subsidiary and a Premium
01:29:35PM 21 door superior wood division, and based upon the financial
01:29:38PM 22 statements, he showed that both of those were businesses that
01:29:42PM 23 lost money.

01:29:43PM 24 Then in his deposition, if Your Honor wants me to
01:29:46PM 25 move to that?

01:29:47PM 1 THE COURT: He doesn't testify that they'll go out of
01:29:59PM 2 business. He says he understands they'll go out of business in
01:30:03PM 3 the earlier paragraphs that Mr. Pfeiffer pointed to.

01:30:06PM 4 MR. PFEIFFER: May I point to one more, Your Honor?

01:30:08PM 5 THE COURT: Just a minute. Paragraph 51 just says
01:30:12PM 6 these lines are unprofitable. That's quite different than
01:30:16PM 7 saying they will go out of business if they can't make the
01:30:24PM 8 other lines.

01:30:25PM 9 MR. DANE: And, Your Honor, he clarified that in his
01:30:28PM 10 deposition which is what I wanted to speak to.

01:30:30PM 11 MR. PFEIFFER: Before we move to that deposition, can
01:30:32PM 12 I point you to one more place in the report, Your Honor? In
01:30:34PM 13 that same report --

01:30:36PM 14 THE COURT: Which report?

01:30:37PM 15 MR. PFEIFFER: May 5th, 2017, report that Mr. Dane
01:30:41PM 16 was just addressing with you, if you actually go back to the
01:30:42PM 17 section that talks about the future lost profits damages, not
01:30:45PM 18 Mr. Kaplan's argument, which is page eight, page eight,
01:30:49PM 19 paragraph 25, under Roman IV.

01:30:53PM 20 THE COURT: And paragraph what?

01:30:55PM 21 MR. PFEIFFER: Paragraph 25, Your Honor. Second
01:31:02PM 22 sentence.

01:31:04PM 23 MR. DANE: I apologize, Your Honor. Could I ask
01:31:06PM 24 counsel which report this is?

01:31:09PM 25 MR. PFEIFFER: The same one, the May 5th, 2017 one.

01:31:11PM 1 The second sentence there says, Mr. Kaplan suggests that my
01:31:14PM 2 lost profits opinion, which is based upon the assumption that
01:31:17PM 3 Steves will not be able to remain in business after its supply
01:31:20PM 4 agreement with Jeld-Wen terminates on September 10th, 2021,
01:31:24PM 5 ignores other possible of sources of door skins to Steves
01:31:27PM 6 beginning on September 11, 2021.

01:31:30PM 7 Could not be more clear in that same report that
01:31:33PM 8 that's an assumption he's making.

01:31:35PM 9 THE COURT: All right. Is that all you wanted to
01:31:37PM 10 point me to?

01:31:38PM 11 MR. PFEIFFER: Yes, Your Honor, that was.

01:31:41PM 12 THE COURT: All right. Where in the deposition is
01:31:44PM 13 it? Come to the lectern so the court reporter can hear you.

01:31:48PM 14 MR. DANE: Thank you, Your Honor. Just so Your Honor
01:31:56PM 15 will understand the ordering of this, in his initial report,
01:32:00PM 16 Mr. Tucker said that this was his assumption. Mr. Kaplan, in
01:32:03PM 17 his report, then challenged that and said, I don't buy that
01:32:08PM 18 assumption because of these other businesses.

01:32:09PM 19 When Mr. Kaplan challenged it, Mr. Tucker did the
01:32:13PM 20 analysis, and then he testified to it in his deposition, and he
01:32:16PM 21 testified to it as his opinion that he was expressing. This is
01:32:20PM 22 at page 59 of Mr. Tucker's deposition.

01:32:28PM 23 THE COURT: Do you have a copy of it that I might
01:32:31PM 24 read? Do you have it, Mr. Pfeiffer?

01:32:34PM 25 MR. PFEIFFER: Yes, we do, Your Honor.

01:32:37PM 1 THE COURT: I've got one.

01:32:43PM 2 MR. DANE: Thank you, Your Honor.

01:32:44PM 3 THE COURT: Page what?

01:32:45PM 4 MR. DANE: 59. So this begins on line seven, Your
01:33:00PM 5 Honor. And Mr. Tucker says, well, it's also my opinion that if
01:33:07PM 6 they cannot purchase molded door skins in the quantities in the
01:33:11PM 7 assumption that I made, that then they would not be able to
01:33:15PM 8 continue in business. Mr. Pfeiffer asked him, sure, yeah. The
01:33:19PM 9 second assumption that's implicit or may be explicit in your
01:33:22PM 10 future lost profits analysis in bullet four is that Steves will
01:33:26PM 11 go out of business after the current supply agreement expires.
01:33:29PM 12 Mr. Tucker said, that's my opinion, yes.

01:33:33PM 13 Mr. Pfeiffer asked him for clarification. Well,
01:33:36PM 14 that's your opinion or that's your assumption? And Mr. Tucker
01:33:40PM 15 made clear. He said that's my opinion with respect to that
01:33:43PM 16 latter half. With respect to the first half -- and the first
01:33:46PM 17 half is these contingencies we're talking about, could they get
01:33:49PM 18 the skins, with respect to the first half, it is an assumption.

01:33:54PM 19 So --

01:33:56PM 20 THE COURT: So then they say, hmm, the first half is
01:34:00PM 21 the assumption that they will be unable to buy in sufficient
01:34:03PM 22 quantity and at prices that will allow them to remain in
01:34:06PM 23 business and from -- from which you then conclude they then
01:34:10PM 24 would go out of business. Answer: That's true, although it's
01:34:14PM 25 slightly different. The first part is an assumption. And we

01:34:20PM 1 talked earlier about what I did with respect to assumptions.
01:34:23PM 2 With respect to the latter, it's not an assumption -- it's not
01:34:29PM 3 just an assumption but based -- excuse me. Based on my
01:34:33PM 4 analysis of Steves, if they don't -- are not in the interior
01:34:39PM 5 molded door skin business, I do not believe they can remain in
01:34:43PM 6 business. I mean, if they can't get -- if they cannot get
01:34:49PM 7 interior molded door skins, they would not be able to remain in
01:34:53PM 8 business; for example, to sell other products.

01:34:55PM 9 MR. DANE: That's exactly right, Your Honor, and Mr.
01:34:58PM 10 Tucker was examined about those opinions at his deposition.

01:35:02PM 11 THE COURT: Okay. Anything else that you have to
01:35:06PM 12 say?

01:35:06PM 13 MR. DANE: No, Your Honor. The only thing I would
01:35:09PM 14 say is that -- and -- I apologize if this is our fault in the
01:35:13PM 15 way we presented the evidence, but if Your Honor felt that it
01:35:17PM 16 would be necessary to hear from the Steves on this issue of
01:35:21PM 17 whether they could remain in business without door skins, we
01:35:25PM 18 we'd certainly be willing to recall them to put in that
01:35:27PM 19 evidence before Mr. Tucker if Your Honor preferred that to
01:35:30PM 20 having him testify based upon his analysis of the financial
01:35:34PM 21 information and his having had prior discussions with them on
01:35:37PM 22 that issue.

01:35:37PM 23 THE COURT: Well, you tell me that I told you you
01:35:40PM 24 couldn't put that evidence on, and is that what you want to do,
01:35:46PM 25 is to put it on? If I did that, I didn't intend to do it that

01:35:51PM 1 way. I intended to stop you from talking about the
01:35:54PM 2 consequences of going out of business but allow you to say, we
01:35:59PM 3 would be -- if we couldn't get supply, we're out of business,
01:36:05PM 4 we don't have any other options to do it, because that also had
01:36:10PM 5 to do with -- the reason I'm sure I intended it as something
01:36:16PM 6 that you could do it, it has to do with the effects on your
01:36:23PM 7 damages apart from lost profits.

01:36:26PM 8 MR. DANE: May I consult with Mr. Pomerantz?

01:36:28PM 9 THE COURT: Yes, but Mr. Pfeiffer -- since it's his
01:36:33PM 10 motion, he has the last word.

01:36:34PM 11 Mr. Pfeiffer, the reason I'm not interested in the
01:36:37PM 12 law is because you have inundated me with it, and I've read it
01:36:40PM 13 and read it and read it. So I know what it is. I'm interested
01:36:43PM 14 in the factual part of it.

01:36:45PM 15 MR. PFEIFFER: My apologies, Your Honor. I didn't
01:36:48PM 16 mean to inundate you with that. Mr. Tucker's testimony at the
01:36:51PM 17 deposition, the part that you were just directed to, is if you
01:36:56PM 18 read it so the first half is the assumption that they will --

01:36:59PM 19 THE COURT: Excuse me. Where are you?

01:37:01PM 20 MR. PFEIFFER: Same page, starting at the bottom of
01:37:04PM 21 59, right where you were --

01:37:04PM 22 THE COURT: You want me to reread the testimony that
01:37:06PM 23 we just went through; is that what you are saying?

01:37:09PM 24 MR. PFEIFFER: Yes, Your Honor, for this purpose: I
01:37:11PM 25 want to explain to you what he said and how that corresponds to

01:37:15PM 1 his report. So the question is, you said, okay, so, um, so the
01:37:19PM 2 first half is the assumption that they will be unable to buy in
01:37:22PM 3 sufficient quantity and that prices that will allow them to
01:37:26PM 4 remain in business from which you then conclude that they will
01:37:30PM 5 then go out of business, and he says that's true although it's
01:37:33PM 6 slightly different.

01:37:34PM 7 At that point it's a tautology. There is no benefit
01:37:38PM 8 to saying if I assume that they won't get enough to remain in
01:37:42PM 9 business, then they'll go out of business.

01:37:45PM 10 THE COURT: I understand what you are saying, but the
01:37:50PM 11 next answer he says, that's true, although it's slightly
01:37:54PM 12 different, and then he goes and cures the very tautology that
01:37:59PM 13 you are -- about which you complain, I believe, if I read it
01:38:02PM 14 right. I'll look at it and see.

01:38:04PM 15 MR. PFEIFFER: I don't think under Rule 26 he can
01:38:07PM 16 cure that by saying something at his deposition that's contrary
01:38:11PM 17 to the analysis that he's laid out in his report, because
01:38:13PM 18 whatever he says here, he still has offered no analysis in any
01:38:17PM 19 of those three reports that says here's how I have concluded,
01:38:22PM 20 here's how I have actually used expertise to conclude that they
01:38:26PM 21 will go out of business other than through this tautology.

01:38:29PM 22 So it simply doesn't appear. There's a serious
01:38:33PM 23 Rule 26 violation he can't cure by saying it on the fly.

01:38:36PM 24 THE COURT: You are raising that now.

01:38:38PM 25 MR. PFEIFFER: I was unaware before that they were

01:38:40PM 1 going to say Mr. Tucker had said this. We heard from Mr. Dane.

01:38:44PM 2 That's why I stood up, because I was surprised to hear that.

01:38:47PM 3 So, yes, this is the first we've had it.

01:38:49PM 4 THE COURT: Anything else?

01:38:50PM 5 MR. PFEIFFER: Well, Your Honor, to the extent that
01:38:54PM 6 you are considering having the Steves testify about this, there
01:38:59PM 7 is some deposition testimony on this subject by Edward Steves
01:39:03PM 8 at his deposition where he characterized it as -- how did he
01:39:07PM 9 say it? Maybe it's an exaggeration to say we would go out of
01:39:11PM 10 business immediately because there would still be value to the
01:39:17PM 11 company afterward.

01:39:19PM 12 THE COURT: He said that -- I don't remember seeing
01:39:22PM 13 anything about that in the papers --

01:39:25PM 14 MR. PFEIFFER: No, this is again --

01:39:26PM 15 THE COURT: One at a time, or you're going to get
01:39:28PM 16 shot. She's not going to shoot me.

01:39:31PM 17 MR. PFEIFFER: My apologies. Sorry about that.

01:39:34PM 18 THE COURT: I don't remember that from the papers,
01:39:36PM 19 but the papers are so voluminous, maybe I just don't have a
01:39:40PM 20 good memory.

01:39:41PM 21 MR. PFEIFFER: I don't know. I can give you the
01:39:43PM 22 cite, Your Honor. It wasn't part of the trial testimony. It's
01:39:47PM 23 part of a deposition, so I'm saying it would be kind of
01:39:50PM 24 pointless to recall him when that would be the testimony that
01:39:53PM 25 would be elicited.

01:39:54PM 1 THE COURT: Well, I guess they call that
01:39:56PM 2 cross-examination.

01:39:58PM 3 MR. PFEIFFER: Fair enough, Your Honor. I shouldn't
01:40:02PM 4 have mentioned it.

01:40:03PM 5 THE COURT: I believe I'd have held the powder on
01:40:06PM 6 that one.

01:40:07PM 7 MR. PFEIFFER: Actually, since he's under
01:40:10PM 8 cross-examination, they wouldn't be allowed to talk to him. I
01:40:13PM 9 think that's all I had to say, Your Honor, was the Tucker
01:40:16PM 10 point.

01:40:17PM 11 THE COURT: Are you going to tag-team here?

01:40:18PM 12 MR. POMERANTZ: Yes, Your Honor, if you permit me
01:40:21PM 13 to --

01:40:22PM 14 THE COURT: Do you want to come in, too?

01:40:24PM 15 MS. ZWISLER: My deposition.

01:40:26PM 16 MR. POMERANTZ: So whether or not we understood the
01:40:27PM 17 line Your Honor was intending to draw, this is what we did at
01:40:30PM 18 the end of Sam Steves' direct testimony which we thought was
01:40:34PM 19 consistent with the line Your Honor had drawn.

01:40:36PM 20 Mr. Powell asks Mr. Steves, "When your contract with
01:40:41PM 21 Jeld-Wen expires in September of 2021, do you now have
01:40:45PM 22 something to replace it?

01:40:46PM 23 "We do not.

01:40:47PM 24 "Do you consider building your own door skin plant to
01:40:51PM 25 be a realistic solution?

01:40:52PM 1 "We do not.

01:40:55PM 2 "Did you consider importing molded door skins from
01:40:57PM 3 overseas manufacturers to be a realistic solution?

01:40:59PM 4 "Well, clearly, it is not.

01:41:00PM 5 "Do you consider buying from Masonite to be a
01:41:02PM 6 realistic solution?

01:41:03PM 7 "I do not.

01:41:04PM 8 "What about buying from Jeld-Wen, do you consider
01:41:07PM 9 that to be a realistic solution?

01:41:09PM 10 "I do not."

01:41:10PM 11 That line of questions was designed to send the
01:41:13PM 12 message to the jurors that Steves has no options in 2021. I
01:41:19PM 13 think it's tantamount -- he didn't then say, we will go out of
01:41:24PM 14 business, but I'm not sure it would be necessary for him to say
01:41:27PM 15 that given this line of testimony, and this was our way of
01:41:31PM 16 going up to the line, but not crossing the line, that we had
01:41:35PM 17 understood Your Honor had drawn.

01:41:36PM 18 THE COURT: All right.

01:41:37PM 19 MR. POMERANTZ: That's what we did.

01:41:39PM 20 THE COURT: That isn't the question on the table. If
01:41:43PM 21 I drew -- I drew the line one way, and you thought I drew it
01:41:48PM 22 another. I can't have the record be in the posture of you
01:41:53PM 23 operating under an erroneous instruction that wasn't clear from
01:41:57PM 24 me, and the time to deal with that is now, before you rest,
01:42:02PM 25 while they have a chance to cross-examine, while they have a

01:42:06PM 1 chance to consider what they want to do in their case.

01:42:13PM 2 So do you want to put your witnesses on to talk about
01:42:16PM 3 that topic before Mr. Snyder testifies?

01:42:22PM 4 MR. DANE: Mr. Tucker, Your Honor.

01:42:24PM 5 THE COURT: Honestly, I'll get them straight about
01:42:26PM 6 the time you get me reversed.

01:42:30PM 7 MR. POMERANTZ: Your Honor, I think the answer is
01:42:31PM 8 probably yes, but I hate to say it without talking to my client
01:42:36PM 9 first. Can we answer that question before the end of this
01:42:39PM 10 lunch break, and then if the answer is yes, we'll put Mr.
01:42:42PM 11 Steves on after Professor Shapiro is done and before Mr. Tucker
01:42:47PM 12 testifies?

01:42:48PM 13 THE COURT: Yes. We'll take a lunch recess. Have
01:42:52PM 14 you all got lunch so we can do 45 minutes?

01:42:54PM 15 MS. ZWISLER: Yes, Your Honor.

01:42:55PM 16 THE COURT: Thank you.

01:42:56PM 17
01:42:56PM 18 (Luncheon recess.)
01:42:56PM 19
20
21
22
23
24
25

1 THE COURT: What did you decide you want to do,
02:37:43 2 Mr. Pomerantz, or Mr. Powell? Whoever is going to address
02:37:47 3 it.

02:37:51 4 MR. POMERANTZ: We will recall Mr. Sam Steves to
02:37:53 5 address the limited issues that we've been discussing.
02:37:56 6 The one issue that we have not yet agreed upon with
02:38:01 7 opposing counsel is whether we can talk to Mr. Steves
02:38:05 8 before he gets on the stand. We think, because we would
02:38:08 9 have done this in our direct case, we'd like to at least
02:38:08 10 have a few minutes to talk to him about what questions we
02:38:10 11 would be asking. But if Your Honor thinks that -- that's
02:38:13 12 the only issue.

02:38:14 13 THE COURT: You can talk to him.

02:38:16 14 MR. POMERANTZ: All right. So what we will do
02:38:17 15 is we will --

02:38:18 16 THE COURT: He's been sitting here in the
02:38:19 17 courtroom --

02:38:20 18 MR. POMERANTZ: Right.

02:38:20 19 THE COURT: -- listening to everything.

02:38:21 20 MR. POMERANTZ: Right. Exactly. We will --
02:38:21 21 he'll testify after Professor Shapiro. So that will
02:38:26 22 probably be after the next break.

02:38:27 23 THE COURT: Okay.

02:38:28 24 MS. ZWISLER: Your Honor, we think they should
02:38:31 25 recall also Edward Steves because if -- if you had made

02:38:35 1 this ruling prior to his testimony, I would have examined
02:38:38 2 him on their profits.

02:38:39 3 THE COURT: Is Edward Steves here?

02:38:41 4 MS. ZWISLER: He's in the city.

02:38:42 5 MR. POMERANTZ: He's in the city. He's not here
02:38:44 6 in the courtroom.

02:38:44 7 THE COURT: Get him down here.

02:38:45 8 MS. ZWISLER: Thank you, Your Honor.

02:38:46 9 THE COURT: You can call him --

02:38:47 10 MS. ZWISLER: Well, but I want to call him --

02:38:49 11 THE COURT: -- in your case in chief.

02:38:49 12 MS. ZWISLER: I certainly will do that for a
02:38:50 13 number of other reasons. They have opened the door to a
02:38:54 14 number of issues. But this issue is critical because
02:38:57 15 Dr. Tucker relies on Steves' profitability, and if they're
02:39:01 16 going to be able to testify they were going to go out of
02:39:04 17 business, they would have done that on direct. That's
02:39:06 18 what he just said about Sam.

02:39:08 19 If Edward, despite telling me that he had no idea
02:39:12 20 what was going to happen in 2021, on Masonite, on
02:39:14 21 Jeld-Wen, on Teverpan, on all of those other suppliers --
02:39:17 22 it's an absolute, straight-up thing. I'll tell the jury
02:39:20 23 that in closing. If he had come on direct, he would have
02:39:22 24 said we would have gone out of business.

02:39:24 25 I get that I could cross him on the exaggeration that

02:39:27 1 he testified to in his deposition, and I certainly --

02:39:29 2 THE COURT: I thought it was Sam.

02:39:31 3 MS. ZWISLER: That's Edward. Edward said, when
02:39:33 4 asked if he was going to go out of business, he testified
02:39:37 5 that's something --

02:39:38 6 THE COURT: Well, they don't have to call him as
02:39:41 7 a witness. They can bring him back here and you can ask
02:39:44 8 him question on direct or cross-examination if you want.

02:39:47 9 MS. ZWISLER: If this had been played out before
02:39:50 10 the direct testimony, they took Edward through the same
02:39:52 11 issues -- in fact, you encouraged them. You said, He
02:39:57 12 needs to tell me why these predicates are a problem.

02:39:59 13 So he testified to there, and they just came right
02:40:02 14 up. And they did not ask him -- I agree. They did not
02:40:05 15 ask him if he was going to go out of business.

02:40:07 16 If they can put Sam up there to say that, then -- and
02:40:11 17 this had happened during the direct, he would have said
02:40:14 18 that, and then pursuant --

02:40:15 19 THE COURT: We can't reinvent that wheel. You
02:40:17 20 can't put Humpty-Dumpty back together again. But I can
02:40:23 21 have him over here and have him available for you to put
02:40:26 22 him on. If they don't want to ask him questions, they
02:40:29 23 don't have to ask him questions.

02:40:30 24 MS. ZWISLER: Okay.

02:40:31 25 THE COURT: But you can ask him questions,

02:40:35 1 cross-examination of him as if you had before.

02:40:38 2 MS. ZWISLER: Yes. Okay. And then that would
02:40:38 3 be before Mr. Tucker speaks?

02:40:40 4 THE COURT: Yes.

02:40:41 5 MS. ZWISLER: Yes.

02:40:41 6 THE COURT: So get him over here, wherever he
02:40:43 7 is.

02:40:44 8 MR. POMERANTZ: Your Honor, before -- let me
02:40:45 9 just -- we never asked Edward Steves the questions we're
02:40:47 10 talking about. We did not open that door in our direct
02:40:50 11 examination, and we're not doing it now. Your Honor has
02:40:53 12 said that he should be available for recall during their
02:40:56 13 case. And that's the way the trial would work.

02:40:58 14 Had we known Your Honor's instruction, if we had
02:41:00 15 interpreted it correctly, we would have called Sam Steves
02:41:04 16 like we're doing now, but we would never asked the
02:41:07 17 question to Edward Steves. And we didn't ask the question
02:41:09 18 to Edward Steves. And so they should call Edward Steves
02:41:12 19 in their case, as you have told us to keep him available,
02:41:15 20 because that what's they want to do with him.

02:41:18 21 THE COURT: Well, she said that he testified
02:41:20 22 that he didn't have any idea about something.

02:41:20 23 MR. POMERANTZ: No. I think what she said is
02:41:20 24 we -- I think she agreed that we did not raise this
02:41:23 25 particular topic, would you go out of business, with him.

Shapiro - Cross

02:41:26 1 MS. ZWISLER: Oh, no. I don't agree.

02:41:27 2 THE COURT: She doesn't -- find me what it is.

02:41:28 3 Get the jury back in. Let's get the expert.

02:41:32 4 Find me what you're talking about, Ms. Zwisler, and
02:41:34 5 then I'll look at it. If I hadn't made the error I made,
02:41:37 6 we wouldn't be in this situation. So I'll try to be as
02:41:42 7 fair as I can to both of you. But I insist on seeing
02:41:46 8 where it is that he said anything that opens it up for you
02:41:48 9 to recross him. If you can't do that, you can't have him.

02:41:54 10 But either way, get somebody to get him over here so
02:41:58 11 we don't have to wait for him.

02:42:00 12 All right. Is Dr. Shapiro here? Come on up and take
02:42:04 13 the witness stand, if you will, sir.

02:42:06 14 THE WITNESS: Yes, Your Honor.

02:42:33 15 (The jury entered the courtroom.)

02:42:35 16 THE COURT: All right. Thank you. Sorry,
02:42:36 17 ladies and gentlemen. I had to take up something with the
02:42:38 18 lawyers.

02:42:41 19 All right. Mr. Pfeiffer, cross-examination.

02:42:44 20 MR. PFEIFFER: Thank you, Your Honor.

02:42:44 21 **CROSS-EXAMINATION**

02:42:44 22 BY MR. PFEIFFER:

02:42:46 23 Q Good afternoon, Doctor Shapiro.

02:42:48 24 A Good afternoon, Mr. Pfeiffer.

02:42:50 25 Q Now, you mentioned earlier today that you've written

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1 a number of articles over the years dealing with the
2 subject of merger analysis, correct?

3 A Yes.

4 Q Okay. And you've set out your views on how mergers
5 should be analyzed in a number of different pieces,
6 haven't you?

7 A Yes. That's correct.

8 Q And it's fair to say you have espoused the view that
9 merger enforcement in the United States should be more
10 vigorous than it actually is in the real world, haven't
11 you?

12 A I think -- yes. We should -- I favor somewhat more
13 vigorous merger enforcement than we have had over the past
14 10 to 15 years.

15 Q In fact, you told that just late last year to a
16 Congressional subcommittee, didn't you; that there should
17 be more vigorous horizontal merger enforcement in the
18 United States?

19 A Yes. That's right. I testified before the Senate.

20 THE COURT: Mr. Pfeiffer, I'm not sure what
21 we're doing, but we're -- you're coming close to an area
22 that I told you you're not going into.

23 MR. PFEIFFER: We're not going anywhere near
24 that area.

25 THE COURT: Yeah. But you can't do what you're

Shapiro - Cross

1 doing without it, I don't think. So you need to get
2 moving into something else instead of policy levels. What
3 he thinks about Congress doesn't have anything to do --
4 what he's told Congress doesn't have anything to do with
5 what he's here to testify about.

6 MR. PFEIFFER: Okay. I'll stay out of Congress,
7 then, Your Honor.

8 THE COURT: And move on to another area.

9 MR. PFEIFFER: Yes, Your Honor.

10 Q In your direct testimony, you recall that you talked
11 about how this was a three to two merger, as it's called?

12 A Yes.

13 Q Okay. But you agree, even with what you have written
14 about mergers, you don't propose that all three to two
15 mergers are necessarily anticompetitive, do you?

16 A No. I said we have to look case by case at the
17 facts.

18 Q You agree that buying a rival and, thereby,
19 eliminating the competition between the buyer and the
20 seller is not, by itself, anticompetitive, don't you?

21 A Of course. I mean, it's -- you have to look at the
22 case -- the facts of the case, like I said.

23 Q Yeah. In any case, you need to look at the specific
24 circumstances of the merger to analyze whether it's
25 anticompetitive, don't you?

Shapiro - Cross

02:45:05 1 A I would say so. The cases I can think of.

02:45:09 2 Q And as you mentioned earlier today, you teach at
02:45:12 3 Berkeley, right?

02:45:13 4 A University of California at Berkeley, yes.

02:45:16 5 Q But you also work, on a frequent basis, as a paid
02:45:16 6 expert, don't you?

02:45:17 7 A I do have a regular consulting business as well, yes.

02:45:20 8 Q And you generally, at least, conduct your work in
02:45:22 9 partnership with Charles River Associates, as you said?

02:45:26 10 A Yes. I'm -- yes. I am associated with them,
02:45:29 11 affiliated.

02:45:30 12 Q That's not part of the University of California at
02:45:32 13 Berkeley, right?

02:45:33 14 A No. It's separate.

02:45:34 15 Q It's a for-profit institution?

02:45:36 16 A Yes. That's right.

02:45:37 17 Q Okay. And Charles River Associates is being
02:45:39 18 compensated for your work in this case at a rate of \$1200
02:45:43 19 an hour; is that right?

02:45:44 20 A That's correct. Yes.

02:45:45 21 Q And you mentioned also that Charles River Associates
02:45:47 22 provided a team of support staff to help you prepare your
02:45:51 23 work in this case?

02:45:52 24 A Yes. That's correct.

02:45:53 25 Q And Charles River Associates charges by the hour for

Shapiro - Cross

02:45:56 1 the time of all those people, too, doesn't it?

02:45:59 2 A They do.

02:46:00 3 Q Do you know approximately how many total people at
02:46:02 4 Charles River billed time to this engagement in the last
02:46:05 5 more than a year you've been doing it?

02:46:08 6 A I'm not sure exactly, but probably around four or
02:46:12 7 five, six. There may be some people who would do a small
02:46:14 8 task, like checking something, that would be more people.
02:46:17 9 But the main people working on it regularly would be three
02:46:19 10 or four.

02:46:20 11 Q Is it three or four or four or five?

02:46:22 12 A I'm not sure.

02:46:23 13 Q Okay. And all those people who have may have billed
02:46:27 14 smaller time to it, how many would that be? Do you know?

02:46:31 15 A I wouldn't know.

02:46:32 16 Q Okay. And do you know how many hours in total
02:46:34 17 Charles River has billed for the time that you and your
02:46:37 18 team have put into this case?

02:46:38 19 A I do not know.

02:46:39 20 Q Not even an approximation?

02:46:41 21 A No. I haven't done that. No, I don't know.

02:46:44 22 Q Fair to say, this is not a case where either Steves,
02:46:47 23 or somebody on its behalf, said to you, Don't spend more
02:46:50 24 than 50 hours on this case, or anything like that, right?

02:46:53 25 A No. I never heard that.

Shapiro - Cross

Q Okay. So -- and nobody that you can recall denied you permission to undertake any kind of analysis that you wanted to do, did they?

A Denied me permission? No. I mean, sometimes we couldn't get data, but no, no permission was denied.

Q Right. So, I mean, if you didn't do an analysis, it was because you, for whatever reason, decided not to do it, right?

A Or it wasn't feasible.

Q Which would be a reason you decided not to do it?

A Okay. If you want to put it that way, sure.

Q Okay. And you're not offering any legal opinions here today. We can agree on that?

A Yes, sir.

Q And you're not an accountant. So you're not offering any accounting positions either, are you?

A That's fair. I'm an economist.

Q And you also aren't offering any opinion in any capacity about the break-even price that Steves could afford to pay for door skins and still remain profitable or viable, are you?

A No. I don't -- I don't have an opinion on that number.

Q Okay. And you do know that as part of this litigation, Steves is claiming that Jeld-Wen breached

Shapiro - Cross

02:47:57 1 certain portions of the contract between the parties,
02:48:00 2 right?

02:48:00 3 A I'm aware of that.

02:48:01 4 Q But you're not offering any opinions about whether
02:48:03 5 Jeld-Wen actually breached any contract provisions, are
02:48:06 6 you?

02:48:07 7 A No. I'm just talking about competition issues.

02:48:09 8 Q And in your work on those competition issues, you
02:48:13 9 agree that as an economist, you're supposed to be looking
02:48:16 10 at the effects of the merger both anti and pro
02:48:20 11 competitive, right?

02:48:22 12 A Well, the overall effects, whether they are
02:48:25 13 anticompetitive -- whether the competition was harmed or
02:48:28 14 not.

02:48:28 15 Q Yeah. And in doing that, you look at both pro and
02:48:31 16 anticompetitive effects to figure out whether the effect
02:48:35 17 overall is anticompetitive, don't you?

02:48:40 18 A Well, if there are claims of merger-specific
02:48:41 19 efficiencies, then I would take that into account, yes.

02:48:44 20 Q Okay. You're not offering the opinion that --

02:48:45 21 THE COURT: Just a minute, please.

02:48:46 22 MR. PFEIFFER: Yes, Your Honor.

02:48:46 23 THE COURT: Wasn't there a ruling on that?

02:48:52 24 MR. PFEIFFER: I'm not aware of a ruling.

02:48:54 25 MR. POMERANTZ: Your Honor, can we approach?

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(Discussion at sidebar as follows:)

THE COURT: I thought I ruled there wasn't going to be any discussion on efficiencies because nobody testified about it.

MR. PFEIFFER: No, Your Honor. In fact, I think you said, actually, we can present evidence of efficiencies. We have witnesses who are prepared to do so. I'm pretty sure that was your ruling.

MR. POMERANTZ: My recollection of the last ruling was Your Honor strongly discouraged them from doing so because of the burden on them and the lack of evidence. But I don't believe Your Honor instructed them not to -- you did say that you would strike it if they didn't tie it up. That's my recollection.

THE COURT: All right. I think you're right.

MR. POMERANTZ: Yeah. I think that's what you said, Your Honor.

THE COURT: Okay.

(End of sidebar discussion.)

Q I'm not sure we finished that question and answer. So let me ask you again. You're not offering the opinion that no benefits resulted from the merger, are you?

A Benefits to whom?

Q To anyone.

A Well, I think Jeld-Wen benefited because they were

Shapiro - Cross

able to raise prices.

Q Okay. Are you offering the opinion that there were no benefits to any of Jeld-Wen's customers through the merger?

A Well, on net -- there might be some particular benefits I'm not aware of. But on net, there's a harm I've described associated with higher prices.

Q Let me bring you back to my question. You're not offering the opinion that no benefits accrued to customers as a result of the merger, are you, whether you net them out or not?

A I am not aware of any benefits accruing to customers resulting from the merger that meet the screen associated with the merger-specific efficiencies.

Q And to be clear, you haven't offered any analysis quantifying any benefits, if there are any, have you?

A I have not quantified benefits because I am not aware of any claims of merger-specific efficiencies associated with this merger.

Q Okay. Now, you know that Steves is just one of -- one of Jeld-Wen's door skin customers, right?

A Of course.

Q And you, in fact, mentioned some others in your direct testimony, right?

A I did.

Shapiro - Cross

02:51:18 1 Q You recall, you even put up a list of the top several
02:51:20 2 of them?

02:51:21 3 A I do.

02:51:21 4 Q But you know that none of them is a witness in this
02:51:24 5 case, right?

02:51:26 6 A I believe that's correct.

02:51:28 7 Q Despite that, you never spoke to any of those other
02:51:31 8 door skin customers in connection with any of your work in
02:51:33 9 this case, did you?

02:51:34 10 A I don't understand the "despite that."

02:51:38 11 Q They are not here as witnesses, and you never --

02:51:40 12 THE COURT: Why would he be talking to other
02:51:42 13 witnesses? You don't -- witnesses don't talk to other
02:51:45 14 witnesses.

02:51:47 15 MR. PFEIFFER: Experts conduct interviews, Your
02:51:48 16 Honor.

02:51:49 17 THE COURT: That's a different issue. That's
02:51:51 18 talking to somebody before they're a witness. You're
02:51:54 19 asking the wrong question. And it really doesn't make any
02:51:58 20 difference anyway. So can you go on to something else?

02:52:03 21 MR. PFEIFFER: Can I just clarify, then, Your
02:52:03 22 Honor?

02:52:06 23 THE COURT: Just move on, please.

02:52:08 24 MR. PFEIFFER: Okay.

02:52:09 25 Q I think you clarified this earlier, but in analyzing

Shapiro - Cross

the effects of the merger, you're supposed to look at the effects in the entire relevant market, right?

A As much as you can, certainly. You'd be interested in all the customers in the market.

Q Right. Not just the effects on Steves. That wouldn't be an appropriate way to do it?

A I'm interested in the effects on all the customers in the relevant market, yes.

Q And, Professor Shapiro, you agree that the demand for interior molded door skins is driven primarily by new home construction, don't you?

A I think it's new home construction and renovation together in the mix. Depends on where we are in the economic cycle.

Q And you also agree that from 2007 to 2009, new home construction fell to historic lows; isn't that right?

A It was a deep recession. So I would agree with that.

Q Do you agree, as you said in your report, that new home construction fell to historic lows during that time period?

A If I used that term, that sounds fine.

Q Okay. And you referred to that time period as the Great Recession, didn't you?

A I do.

Q Okay. Now, as I think we saw a chart of earlier,

Shapiro - Cross

02:53:20 1 during the course of your work, you looked at historical
02:53:22 2 housing start data. Do you remember that chart that you
02:53:25 3 put up?

02:53:26 4 A I do.

02:53:27 5 Q Okay. And based on that data, as of October of 2016,
02:53:35 6 housing starts were still at a level less than 60 percent
02:53:38 7 of their peak value of 2.3 million in January of 20 --
02:53:43 8 2006; isn't that right?

02:53:45 9 A I don't think the peak was quite as high as you said.
02:53:47 10 I was using annual data. Maybe you're using monthly data.

02:53:52 11 Q Why don't you take a look at your supplemental
02:53:54 12 report, if you would, please.

02:53:56 13 A Okay. Where in particular, please?

02:54:02 14 Q If you'd look in particular, please, at pages 16 to
02:54:06 15 17.

02:54:07 16 A Okay.

02:54:08 17 Q There aren't paragraph numbers. So we'll have to
02:54:10 18 just get to it.

02:54:11 19 A Okay. I'm there.

02:54:13 20 Q The last carry-over sentence from page 16 over on to
02:54:20 21 page 17 says, "Though housing starts are recovered from
02:54:25 22 the minimum of .48 million in April 2009 to .98 million in
02:54:30 23 December 2012 and 1.3 million in October 2016, they are
02:54:35 24 still less than 60 percent of the peak value of
02:54:39 25 2.3 million in January 2006." That's what you said in

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your supplemental report, correct?

A Yes. So that's correct. The confusion before was the data we were showing to the jury was annual. And these are broken down by month. That was the peak month. Somewhat higher. This is exactly right.

Q And as we saw, in 2000 housing starts were still less than 1 million, by your calculation, right?

A In what year?

Q 2012.

A Well, here has the month. I'd have to check the chart for the annual, but that sounds about right.

Q So while housing starts had increased from 2009 to 2012, housing starts were still, then, less than half what they were prior to the Great Recession. We can agree on that, right?

A Prior to the peak, I would say, which occurred a bit before the recession started.

Q Yes. Exactly. The peak was prior to the Great Recession.

A Well, the peak was in 2005, if I remember the data right. The recession, I believe, started in late 2007.

Q And you know that companies in the construction sector, in general, suffered greatly during that Great Recession because of the dip in housing starts, right?

A Yes. That's right. It's one of the more --

Shapiro - Cross

02:56:07 1 industries that's more affected by the business cycle
02:56:08 2 housing for construction.

02:56:10 3 Q Right. For example, you know that Masonite went into
02:56:13 4 bankruptcy during the Great Recession?

02:56:15 5 A That sounds right.

02:56:16 6 Q And you know that Jeld-Wen itself had to do a
02:56:19 7 financial restructuring during that time period?

02:56:21 8 A I'm aware of that.

02:56:22 9 Q Okay. Now, you are not a door skin manufacturing
02:56:33 10 expert, are you, sir?

02:56:35 11 A Thankfully, I am not.

02:56:36 12 Q You don't have any prior experience evaluating
02:56:39 13 competitive conditions in the interior molded door skin
02:56:42 14 business either, do you?

02:56:43 15 A No. This is the first time I've looked at this
02:56:46 16 industry.

02:56:47 17 Q Now, you do know that there was some testimony in
02:56:50 18 this case prior to you being here about Steves'
02:56:52 19 investigation into building a molded door skin
02:56:55 20 manufacturing plant. Do you recall that?

02:56:57 21 A Yes. I'm aware of that.

02:56:59 22 Q But you have not undertaken any independent economic
02:57:02 23 analysis of whether Steves could build or buy a door skin
02:57:05 24 plant, have you?

02:57:07 25 A No. I'm relying on the evidence that has been made

Shapiro - Cross

02:57:13 1 available to me about their explorations and also from
02:57:16 2 Jeld-Wen and Masonite on this issue.

02:57:19 3 Q Yes. But you have not done any kind of ground-up
02:57:22 4 analysis of what would be involved to build a door skin
02:57:24 5 plant, have you?

02:57:26 6 A I have not.

02:57:26 7 Q And during the course of your work in this case, you
02:57:29 8 never spoke to anyone who's owned or run a door skin
02:57:32 9 plant, have you?

02:57:34 10 A No. That would -- I did not.

02:57:36 11 Q You haven't visited any door skin manufacturing
02:57:39 12 plants, have you?

02:57:40 13 A No. I visited Steves' plant. But they don't make
02:57:44 14 door skins.

02:57:45 15 Q And you're not an expert in the design of door skins,
02:57:47 16 are you?

02:57:48 17 A I certainly am not.

02:57:49 18 Q And you're not an expert in the quality of door
02:57:54 19 skins, are you?

02:57:55 20 A I am not. We can be very clear about those things.

02:57:58 21 Q So we can agree, you're not offering any opinion
02:58:01 22 about the quality of any door skins that might be
02:58:03 23 available from foreign suppliers, for example?

02:58:06 24 A I'm not offering an opinion on the quality. I can
02:58:09 25 observe what is in the record on that, but I have no

Shapiro - Cross

opinion myself on the quality.

Q Thank you. You do have some familiarity with at least the identities of some of the foreign suppliers that Steves has looked into obtaining door skins from, right?

A Certainly.

Q You're aware of the door skin manufacturer Teverpan, for example?

A Yes. I'm familiar with Teverpan.

Q And you've heard of Kastamonu?

A I have.

Q Yildiz?

A Yes, sir.

Q Okay. But, again, you haven't spoken, in the course of your investigation in this case, with any of those companies, have you?

A No. We have deposition testimony from a person from Teverpan, for example. So I'm aware of that.

Q And with regard to Teverpan, you haven't done any analysis to determine how feasible it would be, as a financial matter, for Teverpan to expand its offerings to meet more of Steves' needs than it currently does, have you?

A I've looked at what the record has on that. I've discussed it in my reports. But I have not done a separate financial analysis, which I think is requested.

Shapiro - Cross

02:59:19 1 Q It is. Yeah.

02:59:20 2 A Okay.

02:59:21 3 Q So you also haven't studied how long it would take
02:59:25 4 Teverpan or any other company to expand its offerings,
02:59:27 5 have you?

02:59:28 6 A It's the same answer as previously. I see what they
02:59:31 7 are saying about that and what they're in discussions with
02:59:34 8 from Steves and from other evidence, but I have not done a
02:59:36 9 separate analysis of the time to expand door skin
02:59:39 10 production in Turkey.

02:59:40 11 Q Okay. Now, it's correct to say that merger analysis
02:59:46 12 requires an assessment of what will likely happen if a
02:59:50 13 merger proceeds as compared to what will likely happen if
02:59:53 14 it does not proceed, right?

02:59:56 15 A That sounds more framed for a merger that hasn't
03:00:00 16 happened yet. But I take the basic idea.

03:00:03 17 Q And that basic idea is what's referred to often as a
03:00:07 18 but-for analysis, right?

03:00:08 19 A You could use that term. I think I know what you
03:00:11 20 mean.

03:00:11 21 Q Yeah. It's sometimes referred to as constructing a
03:00:15 22 but-for world?

03:00:16 23 A Yes. I'm familiar with that term.

03:00:19 24 THE COURT: Are you saying that's what you do
03:00:21 25 for a merger that hasn't happened yet or does it apply for

Shapiro - Cross

03:00:27 1 a merger that has happened?

03:00:29 2 THE WITNESS: No. Either way. I think if
03:00:31 3 you're asking how the merger affected competition, you
03:00:35 4 want to compare the competition with and without the
03:00:39 5 merger. And you're not going to see both of those. So
03:00:41 6 you see one maybe and you try to figure out with the other
03:00:44 7 one, and you're comparing. If the merger hasn't happened
03:00:49 8 yet, you don't know what's going to happen with the
03:00:50 9 merger. You don't know what's going to happen without the
03:00:54 10 merger. So it's even harder. Here we see what happened
03:00:56 11 with the merger, but we're wondering would there have been
03:01:00 12 more competition without it.

03:01:01 13 MR. PFEIFFER: You anticipated my next question,
03:01:02 14 Your Honor.

03:01:04 15 Q So -- and that but-for analysis is, frankly, not even
03:01:08 16 unique to mergers. Antitrust economists use that in other
03:01:12 17 type of antitrust analysis about challenged behaviors
03:01:16 18 besides mergers, don't they?

03:01:19 19 A Yes. I think that's fair.

03:01:20 20 Q Okay. Maybe we'll talk a little bit more about the
03:01:27 21 but for analysis in this case. Professor Shapiro, you
03:01:29 22 aren't claiming that the 2012 merger between Jeld-Wen and
03:01:32 23 CMI caused the Great Recession in any way, are you?

03:01:36 24 A Certainly not. Particularly since the Great
03:01:38 25 Recession happened several years before that.

Shapiro - Cross

Q Exactly. And you also aren't claiming that the merger caused housing starts, from 2012 to today, to be any higher or lower than they would have been but for the merger, are you?

A No.

Q So we can agree that the full effects of the Great Recession and the housing crash on this marketplace have to exist in an analysis of both the real observed world and the but for world, right?

A If the merger had not gone through, we would still have had a modest recovery in housing starts, but we would have had three suppliers of door skins instead of two.

MR. PFEIFFER: I'm going to move to strike as nonresponsive as to the part after "but," Your Honor.

THE COURT: Anybody have anything to say?

MR. POMERANTZ: I think it was responsive.

THE COURT: I think it was responsive. And I think you need to get on with right to the bottom line, you know. There are a lot of things that didn't happen. Just get into the points that you really are worried about.

MR. PFEIFFER: I'm working on it, Your Honor. I'll work faster.

Q Professor Shapiro, you mentioned earlier I think today that to attribute a price increase to a merger, it's

Shapiro - Cross

03:02:58 1 necessary to rule out other explanations that might
03:03:01 2 account for that price increase, right?

03:03:04 3 A It's desirable to explore other explanations as part
03:03:07 4 of determining the likely cause of the price increases.

03:03:11 5 Q And other possible explanations, for a post-merger
03:03:15 6 price increase, could include quality improvements, shifts
03:03:20 7 in demand to favor higher price products and outward
03:03:24 8 shifts in demand, and increases in marginal cost, right?

03:03:32 9 A In general, those are things that can cause prices to
03:03:36 10 go up. That is true. If that's the point as a general
03:03:41 11 concept, I would agree with that.

03:03:43 12 Q You recall having actually written that in a piece
03:03:47 13 you did together with Professor Baker?

03:03:51 14 A No. But I know John, so I bet I wrote it.

03:03:59 15 Q You do agree in this case that demand for interior
03:04:03 16 molded doors and, therefore, door skins has grown since
03:04:07 17 2012, right?

03:04:08 18 A Yes. I showed the housing starts, and that is a
03:04:12 19 factor in growing demand for door skins, yes.

03:04:15 20 Q In fact, you're aware that Steves, in particular, has
03:04:18 21 purchased more than double the amount of door skins in
03:04:22 22 2017 than it did in 2011. Do you recall that testimony in
03:04:25 23 this case?

03:04:27 24 A I don't specifically recall that. But I think the
03:04:29 25 data I have, through at least part of 2017, is right on

Shapiro - Cross

track with approximately a doubling as the market has improved.

Q You talked earlier today about I guess discounting the impact of demand on door skin prices based on your view that capacity utilization was -- was not sufficiently high to have triggered the price increase. Is that about right?

A I don't think I discounted it. I considered it and explained that the increase in demand does not explain the price increase.

Q Okay. But you do agree that Jeld-Wen's capacity utilization did increase since 2012, right?

A Yes. I showed a chart showing going up from 67 percent to between 70 and 73 percent.

Q Right. And I don't believe you've conducted any independent analysis of Masonite's capacity utilization in this case, have you?

A I have information about their capacity utilization. I did not independently study that. But I do have information about that, yes.

Q Professor Shapiro, you didn't offer any analysis showing by how much capacity utilization would need to increase to justify any given level of price increase, did you?

A I don't have a quantification of how that would

Shapiro - Cross

03:05:55 1 occur. When one gets really tight -- really tight

03:05:59 2 capacity, because the change in capacity utilization was

03:06:03 3 quite modest, I didn't need to get into that.

03:06:07 4 Q And to be clear, you haven't offered any sort of

03:06:10 5 formulaic where if capacity utilization increases by

03:06:14 6 5 percent, then prices would be expected to increase by

03:06:17 7 whatever percent, have you?

03:06:18 8 A No. I don't have a formulaic approach like that. I

03:06:23 9 do not.

03:06:24 10 Q And you didn't offer any analysis in this case

03:06:26 11 showing what business steps it took at Jeld-Wen to achieve

03:06:31 12 the increase in utilization capacity -- capacity

03:06:34 13 utilization that you did observe, right?

03:06:39 14 A Well, I looked quite a bit at plant by plant. We

03:06:44 15 measured capacity utilization. But if you mean -- I think

03:06:47 16 you mean by "business steps," more specific actions, I

03:06:50 17 don't know the details of that. No. To go up from 67 to

03:06:54 18 70 percent, I have not done a detailed study of those

03:07:00 19 actions in the plant, if you will.

03:07:02 20 Q Right. You don't know, for example, whether any

03:07:04 21 extra shifts were required at any of the plants to achieve

03:07:07 22 that increase in capacity utilization, do you?

03:07:10 23 A I know I asked about that. I can't remember the

03:07:12 24 answer right now.

03:07:13 25 Q You -- you don't know whether any additional

Shapiro - Cross

03:07:16 1 supervisors needed to be hired to achieve that capacity
03:07:19 2 utilization increase, do you?

03:07:22 3 A I don't know as I sit here. I'd have to check my
03:07:25 4 reports on that one.

03:07:26 5 Q And you didn't analyze how the integration of the
03:07:29 6 Towanda plant and the closing of other Jeld-Wen plants
03:07:33 7 impacted capacity utilization, did you?

03:07:36 8 A Yes, I did. I looked at that, because I had plant
03:07:38 9 level data. So I was able to study those shifts.

03:07:43 10 Q And, Professor Shapiro, do you know how many
03:07:45 11 employees would be needed to run any Jeld-Wen plant at
03:07:50 12 anywhere near the nameplate capacity you mentioned
03:07:54 13 earlier?

03:07:56 14 A Not sitting right here, no. I have data on the
03:07:59 15 direct costs, including labor. So I'm including that
03:08:02 16 category. But I don't know the head counts, no.

03:08:05 17 Q And you don't know how many shifts would be required
03:08:07 18 to run at anywhere near nameplate capacity either, do you?

03:08:11 19 A No, I don't know that specifically.

03:08:13 20 Q Now, you also never conducted any analysis in this
03:08:17 21 case demonstrating that any point prior to the merger,
03:08:23 22 that door skin prices at Jeld-Wen increased or decreased
03:08:28 23 in relation to capacity utilization, did you?

03:08:40 24 A I -- I don't know that I was able to do that prior to
03:08:44 25 2012, or so. I don't think so.

Shapiro - Cross

Q At any rate, you didn't set forth such an analysis in any of your reports. We can agree on that, can't we?

A I think so. That's right. I want to make sure I'm understanding. So you're saying before 2012 --

Q Yeah.

A -- looking at changes in capacity utilization and changes in price and how they might be related?

Q Right.

A Okay. No, I don't think I was able to do that in my reports. I don't think I did.

Q And you also didn't conduct any analysis comparing how Steves' prices for any of its products correlated to changes in its capacity utilization at its plants, did you?

A Now we're talking about doors rather than door skins?

Q Any of their products.

A I'm sorry. I wasn't looking at doors. I was looking at door skins. And they don't make door skins.

Q So you didn't check to see whether there are any changes in capacity utilization corresponded to changes in prices at Steves. We can agree on that?

A We can agree I did not do that. That is irrelevant for the analysis at hand.

Q Now, I think you mentioned earlier today that you are aware that Jeld-Wen entered into a long-term supply

Shapiro - Cross

03:10:00 1 agreement to sell door skins to Steves back in 2012,
03:10:04 2 right?

03:10:05 3 A Yes, sir.

03:10:05 4 Q Okay. And you do agree that the but-for world has to
03:10:10 5 legitimately include that contract between Steves and
03:10:14 6 Jeld-Wen in it, right?

03:10:17 7 A Yes. That's right.

03:10:18 8 Q Because the contract took place before the merger,
03:10:21 9 right?

03:10:22 10 A Yes. I'm hesitating because my understanding is the
03:10:25 11 parties expected the merger to take place at the time the
03:10:29 12 contract was signed, but it did occur before the merger
03:10:31 13 was closed.

03:10:32 14 Q And you're not aware of any provision in that
03:10:34 15 agreement that gave either party an out if the merger
03:10:37 16 didn't close, are you?

03:10:39 17 A I don't think so.

03:10:40 18 Q Okay. And you do know the contract gave a seven-year
03:10:47 19 termination notice provision?

03:10:49 20 A Yes. The one that Jeld-Wen exercised sometime later.

03:10:52 21 Q Yes. But you're not offering the opinion that the
03:10:55 22 merger created that seven-year termination right, are you?

03:10:59 23 A No. My understanding is that was part of the
03:11:01 24 contract signed in May 2012, which was prior to the
03:11:04 25 merger.

Shapiro - Cross

Q Right. Now, I want to make sure I understood your testimony earlier. Are you offering any opinion in this case that the merger increased Jeld-Wen's incentive to breach the contract?

A I don't think I'm offering an opinion about that, no.

Q Save some questions.

A The reason I hesitated, I did talk about how there are ambiguities in the contract, where there's disagreement, and the merger -- and the seller's power that can result in the merger can affect conduct and, therefore, could potentially lead to more disputes about how to interpret the contract. But I don't think of that as talking about incentive to breach, which was your question.

Q Yeah. That's what I want to be clear on. I wanted to make sure I understood you before.

A Okay.

Q So we are clear. You're not offering the opinion that the merger created an incentive to breach the contract?

A No, because I -- no, I'm not. I'm not. With the distinction I made in the previous answer.

Q Yes. So I believe you said earlier this morning that somewhere north of 80 percent of Jeld-Wen's external sales of door skins are governed by price protected supply

Shapiro - Cross

03:12:30 1 agreements. Did I understand you right?

03:12:32 2 A Yes. I think I gave the figure 84 percent. It
03:12:34 3 varies from year to year. But that was the range as of --
03:12:37 4 in that sort of 2014 era.

03:12:40 5 Q And for the sales that are governed by long-term
03:12:44 6 agreements, the prices charged by Jeld-Wen are determined
03:12:48 7 by the contract, not by competitive conditions as they
03:12:52 8 currently exist, right?

03:12:55 9 A Well, not entirely. The contract will specify the
03:13:00 10 prices, but competitive conditions can come into play
03:13:06 11 because some customers, such as Steves, can get a lower
03:13:09 12 price by -- if they have an option to go outside. Because
03:13:14 13 their contract specifies that if they get another offer
03:13:17 14 that's at least 3 percent below what Jeld-Wen is charging
03:13:20 15 them, they have the right to go to that other supplier,
03:13:23 16 notwithstanding their commitment to volume at Jeld-Wen.
03:13:27 17 They basically get an out. So competitive conditions
03:13:30 18 still could very much affect the price that Jeld-Wen
03:13:34 19 charges Steves in that example in the context of a
03:13:37 20 long-term agreement.

03:13:41 21 Q My apologies. I thought you were done. Are you
03:13:43 22 finished?

03:13:44 23 A I am.

03:13:45 24 Q You recall you had your deposition taken in this
03:13:47 25 case?

Shapiro - Cross

03:13:48 1 A I do.

03:13:49 2 MR. PFEIFFER: Your Honor, may we approach with
03:13:51 3 a copy of the deposition transcript for the witness and
03:13:53 4 the Court? Thank you.

03:14:23 5 Q If you would turn, within the deposition transcript
03:14:26 6 that you have there, please, to page 165, starting at line
03:14:36 7 18. There's a question and answer there that goes on
03:14:42 8 until line 17 on page 166. I'll direct you specifically
03:14:50 9 to lines 13 to 14 there. This is your answer. You gave
03:14:57 10 the answer there, didn't you? "So the prices are
03:15:02 11 determined by contract, not by competitive conditions as
03:15:05 12 they currently exist.

03:15:06 13 Correct, sir?

03:15:08 14 A That's the sentence in the longer answer about a
03:15:10 15 different topic. That is what I said.

03:15:13 16 MR. POMERANTZ: I'm sorry. Could you just give
03:15:15 17 me the page and line numbers?

03:15:17 18 MR. PFEIFFER: Yes. The full sequence is 165-18
03:15:20 19 to 166-17. And the specific sentence is at 13 and 14.

03:15:27 20 MR. POMERANTZ: Thank you.

03:15:28 21 A I stand by both answers.

03:15:32 22 THE COURT: Mr. Pfeiffer, that's not -- you have
03:15:34 23 to have an impeachment, and that didn't do it. Just make
03:15:39 24 sure it does.

03:15:40 25 MR. PFEIFFER: Yes, Your Honor.

Shapiro - Cross

03:15:41 1 THE COURT: If he -- you know, you took part of
03:15:43 2 it out of context, and part of it was right and part of it
03:15:52 3 amassed what he said. Let's do it right. Okay?

03:15:56 4 MR. PFEIFFER: Yes, Your Honor.

03:15:57 5 Q Now, in the but for world, sales to that same 84 or
03:16:04 6 90 percent, whatever it is, would, to the same extent, be
03:16:10 7 governed by contract rather than current competitive
03:16:12 8 conditions, right?

03:16:14 9 A In the but for world, regarding Steves, for example,
03:16:18 10 the contract would still be in place, but we would have
03:16:24 11 CraftMaster as an alternative supplier, who might still
03:16:28 12 seek Steves' business. But the contract and the prices --
03:16:30 13 the formula specified in the contract for the prices would
03:16:33 14 still be in place.

03:16:36 15 Q So, yes, the contract would still be governing
03:16:39 16 pricing, right?

03:16:41 17 A As I've described before, the contract specifies
03:16:44 18 certain prices. And those will be the prices unless
03:16:48 19 Steves can get a lower price by exercising its right under
03:16:53 20 that contract --

03:16:55 21 Q Sure.

03:16:55 22 A -- to go outside if the discount is at least
03:16:58 23 3 percent from somebody else, such as CraftMaster.

03:17:02 24 Q The prices charged under the contract will be
03:17:05 25 governed by the contract is what I'm trying to establish.

Shapiro - Cross

03:17:08 1 We agree on that, right?

03:17:09 2 A I thought we were talking about the prices that
03:17:12 3 Steves would pay to Jeld-Wen.

03:17:15 4 Q Yes.

03:17:15 5 A Which are either the ones specified in the contract
03:17:17 6 or lower ones if they can get lower ones by exercising
03:17:21 7 another -- by having another choice.

03:17:22 8 Q Okay. I think I -- I think we're on the same page.

03:17:25 9 A Good.

03:17:26 10 Q Okay. Now, the long-term agreement between Steves
03:17:31 11 and Jeld-Wen is quite specific about pricing, isn't it?

03:17:35 12 A Yes. You're referring to the key input costs and
03:17:38 13 the -- used as an index to govern changes in prices year
03:17:42 14 to year?

03:17:43 15 Q Well, I'm actually referring to -- that's how you
03:17:46 16 characterized it. Do you recall that?

03:17:47 17 A That's my understanding of the contract, yes.

03:17:49 18 Q Okay. And because that long-term contract is quite
03:17:52 19 specific about pricing, that has given some protection to
03:17:55 20 Steves, hasn't it?

03:17:57 21 A Absolutely.

03:17:57 22 Q Okay. In fact, you calculated, didn't you, that the
03:18:06 23 difference between the 2016 and 2012 average prices
03:18:12 24 charged to Steves is roughly 1.1 percent, didn't you?

03:18:19 25 A Okay. I -- that sounds right. I can check it, but

Shapiro - Cross

that sounds right.

Q Okay. And those prices only changed about 1.1 percent between 2012 and 2016 because the existence of the long-term supply agreement between Jeld-Wen and Steves dampened any post-merger price increases, right?

A Yes. That's all correct.

Q Okay. Professor Shapiro, you're obviously familiar with the concept of inflation, right?

A Yes. I think we all are, actually.

Q We probably are all. When doing the calculation leading to the 1.1 percent price increase from 2012 to 2016, you didn't adjust for inflation, did you?

A Well, it depends on what type of inflation. Inflation refers to changes in prices over time. We normally think of prices going up. In this case, since the cost went down, Steves' price was supposed to go down under the contract. So actually, deflation is what I did not adjust for.

Q Let me be more clear. You didn't adjust for any consumer price index or any other general economic measure of inflation, did you?

A No. That's not applicable here. The relevant -- the consumer price indexes talk about the prices that consumers pay for things, which have been going up about 2, 3 percent a year. The price index here is costs for

Shapiro - Cross

03:19:52 1 Jeld-Wen, which are going down. That's what the key cost
03:19:54 2 is. It's an index. There was deflation at this time.

03:19:56 3 Q No. I understand about the contractual price. I'm
03:19:59 4 just saying, relative to the consumer price index, or any
03:20:02 5 other measure, you didn't apply that inflation indicator
03:20:05 6 to your measurement. We can agree on that?

03:20:08 7 A No. I did apply. I applied the key cost index.
03:20:11 8 That's an index. It happens to be going down. So it's
03:20:14 9 deflation. I looked at average variable cost. I did not
03:20:17 10 apply a consumer price index because it's not appropriate
03:20:21 11 in this setting. This is not about consumer prices.

03:20:25 12 Q Okay. One of the ways that antitrust economists
03:20:28 13 conduct merger analysis is to compare current market
03:20:33 14 prices with hypothetical competitive prices that would
03:20:37 15 have prevailed in the market if the merger hadn't taken
03:20:41 16 place. Is that fair to say?

03:20:43 17 A No. I don't think I -- or maybe -- could you ask it
03:20:47 18 again? It didn't sound quite right to me, no.

03:20:54 19 Q Sure. Let's take it a step back. In looking at
03:20:57 20 what's called -- you're familiar with the concept of a but
03:21:00 21 for price generally, aren't you?

03:21:02 22 A Yes. That's fair. Yes, I am.

03:21:05 23 Q In looking at a but for price, you compare an
03:21:12 24 observed market versus what you called but for world, or
03:21:15 25 but for price, that would have prevailed in an alternative

Shapiro - Cross

03:21:19 1 reality where, for example, a merger didn't take place.

03:21:21 2 Does that sound right to you?

03:21:24 3 A I'm with you so far.

03:21:25 4 Q Okay. We agree on that?

03:21:27 5 A I understand you.

03:21:28 6 Q Okay. And you reviewed your reports and your

03:21:34 7 deposition in preparation for testifying here today,

03:21:36 8 didn't you?

03:21:38 9 A I did not review the deposition. I reviewed the

03:21:41 10 reports.

03:21:42 11 Q Well, do you recall we discussed at your deposition

03:21:44 12 the topic of what the but for competitive price for door

03:21:48 13 skins would be in a hypothetical world in which the merger

03:21:51 14 did not take place?

03:21:54 15 A No, I don't recall that. I mean, I -- I can easily

03:21:57 16 believe we talked about it, but I don't recall specifics.

03:21:59 17 Q Okay. For example, do you recall specifically that I

03:22:04 18 asked you, Can you tell me what the but for competitive

03:22:07 19 price would be for the year 2017?

03:22:12 20 A No, I don't recall your asking that specifically.

03:22:15 21 Q Okay.

03:22:19 22 MR. PFEIFFER: Your Honor, may I refresh the

03:22:21 23 witness' recollection by referring him to deposition

03:22:25 24 testimony?

03:22:26 25 THE COURT: Yeah.

Shapiro - Cross

Q So this is just to refresh your recollection. You don't have to read this into the record. But will you take a look at your deposition, please.

A Okay. Where?

Q Page 31, starting at line 17.

A Okay. Okay. I can start reading -- do you want to give me a sense of how long I need to read?

Q Yeah. Well, there's two questions and answers. So the first question and answer goes from 31, line 17, over to 32, line 1. And then it also goes over from there, from 32, line 2, to 33, line 11. It might be useful to refresh your recollection.

A Okay. May I take a moment to do that, then?

Q Of course.

THE COURT: Mr. Pfeiffer, can you point him to some part of it that would help refresh his recollection about what you're asking about? I don't know that I'm knowledgeable enough to understand it, but I have read what you've asked and I don't even see anything that even deals with it, except the general topic that begins in the question, "Where in your reports do you set forth what you consider to be the competitive price for door skins as of 2017?"

MR. PFEIFFER: Yes.

THE COURT: You all have a long discussion about

Shapiro - Cross

03:24:02 1 something that doesn't even appear to be that.

03:24:05 2 MR. PFEIFFER: It's actually following -- the
03:24:06 3 next question and answer follow from that, and there will
03:24:10 4 be follow-up questions. So I think it's better to have
03:24:12 5 him read the whole thing.

03:24:14 6 THE COURT: Then ask him the question, not this
03:24:16 7 one. Because he needs to read three pages and figure out
03:24:20 8 where in there you think it's something he needs to think
03:24:23 9 about again.

03:24:24 10 MR. PFEIFFER: Okay.

03:24:25 11 THE COURT: And that's wasteful of time.

03:24:29 12 Q Do you recall now that I did ask you the question
03:24:30 13 about 2017 competitive price?

03:24:33 14 A I've read the portion you asked me to read.

03:24:35 15 Q Okay. And do you recall, you said you said couldn't
03:24:39 16 point to any single sentence in your report that lays out
03:24:43 17 what you consider to be the competitive market price for
03:24:46 18 door skins as of 2017, right?

03:24:47 19 A Yes. I see that at the bottom of page 31 in the
03:24:50 20 deposition.

03:24:50 21 Q You then took the position that the competitive price
03:24:53 22 for 2017 follows from your analysis, right?

03:25:00 23 A I see that. Yes.

03:25:01 24 Q Okay. We can agree, there isn't any recitation of
03:25:07 25 but for competitive prices that actually appears anywhere

Shapiro - Cross

1 in any of the reports you did in this case, right?

2 A No. I strongly disagree with that. It's fundamental
3 to what I've done by looking at costs and showing that
4 costs went down. So under competition, prices would go
5 down. That's a fundamental point.

6 Q And I get your fundamental point. We're going to get
7 to that. What I'm saying is you haven't laid out what
8 prices should have been, what the competitive price should
9 have been in any year?

10 A I have not -- no. I have not said a particular price
11 of what door skin prices would have been in 2016. I'm not
12 going to predict things that are that a fine point that I
13 can't predict. What I'm telling you is the prices would
14 have gone down under competition, and they went up after
15 the merger.

16 Q And -- thank you. That's what I wanted to clarify.

17 A Okay. Good.

18 Q And you know that your counterpart, Mr. Tucker, is
19 handling the damages in this case, right?

20 A I didn't know he was my counterpart. But okay. I
21 know who Mr. Tucker is, and he's handling damages.

22 Q Did you check any of his work to see whether he set
23 out a competitive but for price?

24 A I did not.

25 Q Okay. Would you agree, Professor Shapiro, that the

Shapiro - Cross

question in merger analysis is whether the merger made things worse from a competitive point of view?

A That's a good summary. I would think that's fair.

Q Okay. And as I understand your testimony, if you were going to determine the competitive price, you would start with the 2012 price, right?

A See, you use the term "competitive price," and I'm taking a simpler approach. So I'm not sure what you mean when you just use that term alone. I'm taking the price -- what was the price before the merger? What happened later with competition -- without competition -- let me fix that -- with less competition? What would have happened with more competition?

I don't know what you mean when you say "competitive price." This is one of the reasons we had trouble in the deposition. You're not using the term in a way that I think is accurate.

Q Okay. Well, your opinion here is that if Jeld-Wen's costs went down, as you've measured them, then you would expect the but for world price in which the merger didn't take place to have gone down, right?

A Yes. Other things equal, that is correct.

Q Okay. So if I refer to it as the but for price, you're more comfortable with that?

A Just so long as we know what we're talking about,

Shapiro - Cross

that's fine.

Q Sure. And when you were referring to costs earlier today, that had some intended -- let me start over.

You referred to what you designated average variable cost earlier today. Do you recall that?

A Yes. That's one of the concepts of cost.

Q And you believe that as there were decreases in average variable costs, as you measured it. The but for price in which the merger had not taken place should have decreased if the average variable cost went down, right?

A That's right. I should clarify, I'm interested in all the -- the costs of all the suppliers in the market. I have the best information about Jeld-Wen. And since many of those costs are input costs, they would be experienced by other suppliers. So those are the sort of costs that are variable costs in the market that would lead -- cause prices to go down. That's my opinion.

Q But you didn't actually analyze Masonite's costs, for example?

A I did not have detailed information on their costs. So that is correct. I was unable to measure that in the same way that I could measure Jeld-Wen's costs.

Q And you talked about how, in a competitive market, the prices should -- should decrease if average variable cost decreases, right?

Shapiro - Cross

03:29:15 1 A Well, that's what normally happens unless -- unless
03:29:18 2 there's capacity constraints come into play. That was the
03:29:21 3 other possibility that I considered.

03:29:23 4 Q Yes. But, again, the context of that is that's what
03:29:27 5 happens in competitive markets, right? That was your
03:29:30 6 terminology earlier today, wasn't it?

03:29:32 7 A That's fair. Yes.

03:29:32 8 Q But you agree that even before the merger, the door
03:29:35 9 skins market, as you've defined it, was a highly
03:29:39 10 concentrated market, wasn't it?

03:29:41 11 A That is true.

03:29:41 12 Q In fact, I think you said earlier today that even a
03:29:44 13 market with a few competitors is considered oligopolistic,
03:29:49 14 right?

03:29:52 15 A That is true.

03:29:52 16 Q And this market only had three competitors before the
03:29:58 17 merger, didn't it?

03:29:59 18 A That is true.

03:29:59 19 Q One of whom was less than half the size of either of
03:30:01 20 the other two competitors, by your market share
03:30:04 21 calculations?

03:30:05 22 A That is true as well.

03:30:06 23 Q Okay. So the but for world that we're assuming also
03:30:07 24 has to assume that it would be a highly concentrated
03:30:12 25 market, right?

Shapiro - Cross

03:30:13 1 A Yes. That's correct.

03:30:14 2 Q Okay. And we can agree, in highly concentrated
03:30:18 3 markets in the real world, companies don't set their
03:30:21 4 prices to correspond to changes in average variable cost;
03:30:25 5 isn't that true?

03:30:31 6 A Well, it's a more complicated answer. I would say
03:30:38 7 since -- in those concentrated markets, the firms tend to
03:30:42 8 have pricing power. Prices don't necessarily track cost
03:30:49 9 changes in the same way as in a very competitive market.
03:30:52 10 So I agree with that.

03:30:53 11 And the implication here is that even with three
03:30:59 12 firms, we don't know that they would have fully passed
03:31:03 13 through the costs if there hadn't been the merger, because
03:31:07 14 there are only three. They still might not have fully
03:31:10 15 passed them through. The evidence before the merger
03:31:12 16 indicates they were quite competitive, particularly, for
03:31:15 17 example, to get Steves' business. So I think it's
03:31:17 18 justified to think that a good portion of the cost savings
03:31:19 19 would have been passed through, but we can't be sure.

03:31:23 20 Q And you haven't offered any qualitative analysis in
03:31:25 21 any of your work to show the degree to which the
03:31:29 22 participants in this market, CMI, Jeld-Wen and Masonite,
03:31:34 23 passed through to their customers changes in their average
03:31:38 24 variable cost before the merger, have you?

03:31:41 25 A I do not know the pass-through rate. But it doesn't

Shapiro - Cross

03:31:45 1 matter for my conclusions because we're just talking about
03:31:48 2 how much prices would have fallen if not for the merger,
03:31:51 3 even if it was only a little bit. In fact, prices went up
03:31:54 4 substantially. So we still reach the -- we still properly
03:31:58 5 reached the conclusion that the merger caused prices to go
03:32:01 6 up.

03:32:01 7 Q But you don't know whether in the pre-merger highly
03:32:05 8 concentrated door skin market, whether there were
03:32:08 9 instances in which average variable cost changes were not
03:32:12 10 passed through at all; isn't that true?

03:32:14 11 A I -- well, I -- I guess I really don't know enough
03:32:21 12 from earlier to know for sure. But, again, even if they
03:32:25 13 weren't passed through at all, then we would have prices
03:32:27 14 be flat. In fact, prices went up when we went from three
03:32:31 15 to two. So, again, it's not going to change my opinion.

03:32:35 16 Q Sir, average variable cost, the figure you're using
03:32:39 17 here, doesn't include fixed costs. I think you said that
03:32:42 18 earlier today, right?

03:32:44 19 A That's correct.

03:32:44 20 Q But you agree that in industries with high fixed
03:32:47 21 costs, companies have to recover those fixed costs in the
03:32:53 22 long run to remain viable, don't they?

03:32:56 23 A Yes.

03:32:57 24 Q Okay. And by the way, in this case you don't think
03:33:00 25 that there's a meaningful gap between average variable

Shapiro - Cross

cost and what's called marginal cost; isn't that correct?

A I don't think I've offered an opinion about that gap.

Q May I refresh your recollection by pointing you to your deposition?

A Sure.

Q Take a look, please, at page 196. If you'd look at lines 12 through 17.

A Okay.

Q I think you'll see a typo in there, but take a look at that and see if that refreshes your recollection about whether you spoke to whether there was a meaningful gap?

A This says depending on the industry involved. It's not even about this industry, the question.

THE COURT: Mr. Pfeiffer, come here just a minute, will you, please.

MR. PFEIFFER: Yes, Your Honor.

THE COURT: Put the white noise on.

(Discussion at sidebar as follows:)

THE COURT: If you look at what you're pointing him to --

MR. PFEIFFER: Yes, Your Honor.

THE COURT: -- it doesn't do what you're talking about trying to do. In fact, it sort of almost says the opposite of what your question was.

Now, if you do that again, I'm going to ask you to

Shapiro - Cross

1 sit down. When you get an impeachment question, you must
2 impeach. You can't -- and then you change the question on
3 him and you change what you were asking. And it wastes
4 time for us to go through this process. And that's what's
5 going to happen if it keeps up. So just -- if you do it
6 again, that's going to be it.

7 MR. PFEIFFER: Yes, Your Honor.

8 THE COURT: That's three times in a row you've
9 taken a swing and you've missed.

10 (End of sidebar discussion.)

11 THE COURT: The question is off the table.

12 THE WITNESS: Yes, Your Honor.

13 Q Professor Shapiro, would you agree that it is an
14 error to infer genuine antitrust market power based on the
15 gap between price and marginal cost?

16 A Taken in isolation, that is correct, as a matter of
17 levels.

18 Q And I think you said this earlier, but the average
19 variable cost information that you are referring to here
20 is Jeld-Wen specific, right, not industry wide?

21 A Yes, sir.

22 Q Okay. Have you done any analysis showing that before
23 the merger, CMI priced any of its products, door skins or
24 any other, in accordance with changes in its average
25 variable cost?

Shapiro - Cross

03:36:22 1 A I don't have information on changes in their average
03:36:26 2 variable costs over time. I can't do that. I don't know.

03:36:29 3 Q Okay. Do you have any evidence that any door skin
03:36:32 4 manufacturer anywhere in the world currently sets its door
03:36:37 5 skin prices to correspond to changes in average variable
03:36:42 6 cost?

03:36:44 7 A It's the changes in prices that are driven by the
03:36:47 8 changes in costs, not the levels, which is what your
03:36:51 9 question said.

03:36:51 10 Q Okay. And do you have any evidence that any door
03:36:54 11 skin supplier anywhere in the world changes its prices in
03:36:59 12 accordance with changes in its variable -- average
03:37:03 13 variable cost?

03:37:06 14 A We see that in the general patterns of the industry.
03:37:08 15 But I don't have specific cost data on individual firms
03:37:12 16 other than Jeld-Wen. So I cannot test that question.

03:37:17 17 Q Right. And -- I believe you testified earlier today,
03:37:27 18 at least to some extent, about prices that Jeld-Wen
03:37:29 19 charged to a door manufacturer called Lynden. Do you
03:37:32 20 recall that?

03:37:32 21 A I do.

03:37:33 22 Q Okay. And did you also mention pricing to Excel? Am
03:37:38 23 I remembering that correctly?

03:37:40 24 A I did. Yes, sir.

03:37:41 25 Q Thank you. And as I understood it, you claimed that

Shapiro - Cross

both companies paid more in connection with their most recent long-term contracts than they did under prior agreements with Jeld-Wen, right?

A Well, that would be true for Lynden. Excel did not have a prior long-term agreement. So it's not quite right for Excel.

Q All right. Let's stick with Lynden, then, to start. Your understanding is that part of the reason for the increased pricing to those two companies was to help pay for some of Jeld-Wen's capital costs; is that right?

A I understand that's Mr. Hachigian's rationale that he presented to them in raising his prices.

Q And especially in a market where there's been historically low demand through an unprecedented event like the housing crisis, you would expect to see companies attempt to recover some of their long-term costs as a recovery began to occur, wouldn't you?

A What I would expect is that -- this is the normal pattern in manufacturing industries that we've studied for decades. When capacity starts to become tight again, when the economy gets to that point for a given industry, that's when the margins go up, and that's when companies say, okay, now I'm making some money. Now I might need to add capacity because it's getting full. And that's the signal to add more capacity.

Shapiro - Cross

03:39:17 1 Until that happens, they might want to get more
03:39:20 2 money, but they can't do it because if there's
03:39:23 3 competition, the other guy is going to try to sell
03:39:26 4 instead. So it's got to be capacity to drive that getting
03:39:30 5 tight.

03:39:30 6 Q In a situation, however, where there's only already a
03:39:35 7 highly concentrated oligopolistic market and there is some
03:39:42 8 pricing control, wouldn't you expect companies in that
03:39:44 9 industry coming out of an unprecedented crash to try to
03:39:48 10 recover some of the cost they may not have been able to
03:39:51 11 have recovered during the crash?

03:39:53 12 A Well, again, each one would try to do that. That's
03:39:54 13 right. If there are a lot of them with excess capacity,
03:39:57 14 it's not going to happen. They might want to, but they're
03:40:01 15 not going to be able to impose the price increases.

03:40:04 16 Once you get down to a smaller number, three, it's
03:40:09 17 more iffy. Okay. And that's why I can't give a stronger
03:40:12 18 prediction in theory. What I can tell you is in 2012 with
03:40:16 19 three of them, there was some good competition going on
03:40:16 20 there, and we didn't see that later. But -- no. But I
03:40:19 21 agree with you that competition was already not as strong
03:40:23 22 as we would like in 2012.

03:40:25 23 Q Back to Lynden and its renegotiation with Jeld-Wen.
03:40:29 24 Did you actually conduct any analysis of the 2012 contract
03:40:35 25 with the renegotiated contract?

Shapiro - Cross

03:40:38 1 A Well, yes. That was -- the price increase that I
03:40:41 2 showed to the jury was the comparison of the two.

03:40:43 3 Q Apart from the pricing terms, did you do a comparison
03:40:46 4 of differences in any of the other terms of the agreement?

03:40:50 5 A Oh, okay. I did look at that, but I can't recall all
03:40:52 6 the details.

03:40:53 7 Q Okay. Do you recall having set forth such an
03:40:56 8 agreement in your reports -- such an analysis in your
03:41:00 9 reports?

03:41:01 10 A No. You just asked, I thought, if I looked at it. I
03:41:05 11 don't remember what I found. I don't know that it's in
03:41:07 12 the reports. I'm not sure about that.

03:41:09 13 Q And you're not offering any opinion about how many
03:41:14 14 nonmonetary benefit there was to Lynden in the
03:41:17 15 renegotiated contract relative to its prior contract, are
03:41:21 16 you?

03:41:22 17 A I'm not aware of any particular nonmonetary benefit.
03:41:26 18 Is there something you're referring to?

03:41:28 19 Q I'm asking you, did you do an analysis to determine
03:41:31 20 what benefits there were, leaving aside the price term?

03:41:35 21 A So I -- I remember asking about what else happened in
03:41:39 22 that renegotiation where I was aware of the price increase
03:41:45 23 that Lynden agreed to. Of course, they got the extension
03:41:49 24 of the -- they weren't terminated. Okay. So that was a
03:41:52 25 benefit, along the lines of the lease example with the

Shapiro - Cross

landlord I gave earlier. But other changes, I just can't remember right now between the two contracts.

Q And when you said you asked about that, you didn't talk to anybody from Lynden about that and get their view, right?

A No. No. No. When I say that, I mean as part of my investigation, I learned about this episode. We had access to some of these contracts, I believe, and -- or at least some information from Jeld-Wen about the contracts. I can't remember the details. So I want to know as much as I can about it. That's what I mean when I say I asked.

Q And you haven't cited in your reports to any evidence from Lynden, or Excel for that matter, that they believe they would have received lower prices absent the merger, have you?

A I have precious little information from them to work with.

Q Okay. Now, in your discussion of price increases to other door manufacturers besides Steves, you looked at a slide, do you recall that, that had sort of a twisted arrow in it? Do you --

A Yes. I thought it was the screwdriver slide, or so I've heard it referred to. Maybe that's right, but yes.

Q Don't know the answer to that.

A Yes. I'm aware of the slide.

Shapiro - Cross

Q And that's -- did you actually look at the underlying document from which that slide came?

A I looked through that entire deck, if that's what you mean.

Q Yes. So then you know that that deck is an incomplete draft, not a final document, then, don't you?

A I understand there's been some back and forth about that. I'm aware of that, yes.

Q Yeah. You're not disputing that that's an incomplete draft, are you?

A No. It is what it is. I thought there was like a page with somebody's name on it. Things like that. Is that right?

Q Yeah. And a page that just said --

THE COURT: All right. That's enough. He's not disputing it.

Q And you know that at least some parts of that document, besides being incomplete, are actually in error, don't you?

A There's one number I know that I think is not correct. If there are other errors, I'm not aware of them.

Q But even though this was an incomplete draft and there's at least one error that you picked out, you're still relying on that for your assessment of increased

Shapiro - Cross

pricing to a number of third party door manufacturers; is that right, sir?

A Well, along with the data I have to actually check what the price increases were. That's how I know one of the numbers is in error, because I actually measured the price increases.

Q And did you actually go back and verify each of the numbers that you looked at in that slide that was up earlier today, the screwdriver slide, as you put it?

A No, I don't know that each one. For example, I'm not -- no, not every number. But the numbers that I presented to the jury were ones that I separately checked and verified with other information.

Q Now, you know that part of this case turns on the prices charged for two specific Jeld-Wen door skin models called the Madison and the Monroe, right?

A Yes. We talked about those.

Q Like I say, you had a slide up earlier about those, as I recall?

A I did.

Q And you know that Jeld-Wen introduced both the Madison and the Monroe door skin models after the long-term agreement was signed with Steves, right?

A Yes.

Q And also after the merger was consummated in October

Shapiro - Cross

03:45:17 1 of 2012, right?

03:45:19 2 A Yes. I know that.

03:45:21 3 Q So we can agree, you can't actually compare current

03:45:25 4 Jeld-Wen prices for the Madison or the Monroe to

03:45:29 5 pre-merger prices for those two door skins, right?

03:45:34 6 A Because they weren't offered at the time of the

03:45:35 7 merger.

03:45:36 8 Q Yes.

03:45:37 9 A Agreed.

03:45:38 10 Q And in assessing the difference in price, you refer

03:45:42 11 to what you -- at your deposition at least, referred to as

03:45:46 12 the equivalent Craftsman design door skin. Does that

03:45:50 13 sound right?

03:45:51 14 A I may have used that term. I would -- I would now

03:45:54 15 just say comparing it to the prices that were in the

03:45:58 16 long-term agreement for Craftsman style door skins.

03:46:02 17 Q Okay. And I think we covered this, but you're not an

03:46:08 18 expert in the design of molded interior door skins, right?

03:46:12 19 A I am not.

03:46:13 20 Q Okay. No one at Steves told you to assume that the

03:46:17 21 Madison and Monroe door skins are equivalent to other

03:46:20 22 Craftsman designs; isn't that right?

03:46:23 23 A No. They didn't tell me any such thing, no.

03:46:26 24 Q Okay. But you didn't conduct any analysis to

03:46:34 25 determine whether Madison and Monroe door skins are

Shapiro - Cross

03:46:39 1 reasonable substitutes for other door skins in the eyes of
03:46:42 2 consumers, did you?

03:46:47 3 A I could -- they're Craftsman style doors. Is there
03:46:50 4 any dispute about that? I don't think there was a dispute
03:46:53 5 about that.

03:46:54 6 Q Did you conduct any quantitative analysis to see
03:46:57 7 whether, in the eyes of consumers, they viewed Craftsman
03:47:00 8 and Madison and Monroe as interchangeable?

03:47:04 9 A Interchangeable. Okay. That's a -- well, we know
03:47:09 10 that there's -- at least at that time, consumers were
03:47:12 11 evidently willing to pay a significant premium for
03:47:16 12 especially the Monroe. So it seems like it had some style
03:47:21 13 advantages just based on market prices there that Jeld-Wen
03:47:25 14 was able to charge. We know that much, within this group
03:47:30 15 of Craftsman style doors.

03:47:32 16 Q Right. That Jeld-Wen was able to charge and people
03:47:34 17 were able to charge --

03:47:39 18 THE COURT: Dr. Shapiro, try to listen to the
03:47:39 19 question, because I think the question simply was did you
03:47:42 20 do a study about what the consumers actually thought. And
03:47:45 21 the answer to that is no, you didn't; isn't that right?

03:47:47 22 THE WITNESS: No study, but we do learn
03:47:50 23 something from the price differences.

03:47:57 24 Q Have you studied the prices that independent door
03:47:59 25 manufacturers are able to charge for Madison and Monroe

Shapiro - Cross

relative to Craftsman doors?

A I do think we looked at that, but I don't remember what the price differences were. I focused on the door skin price differences.

Q Did you do any analysis to determine whether Steves or any other independent door manufacturer was pricing Madison and Monroe doors -- sorry -- changing the price of Madison and Monroe doors to correlate to any changes in their average variable cost?

A No.

Q Okay. Now, you mentioned earlier today some -- some issues about Masonite and what Masonite did after the merger. Do you recall that?

A Yes, I do.

Q Okay. You're not offering the opinion that Masonite and Jeld-Wen actually agreed to do anything related to the doors or door skin market after the merger, are you?

A Agreed to do anything. I don't think any of my opinion involves agreements between those two companies. Nothing I can think of.

Q You talked about the level of door skins that Masonite was selling after the merger, and I want to talk to you some more about that. You know that Masonite didn't sell very many door skins to Steves even before the merger, don't you?

Shapiro - Cross

03:49:40 1 A Well, we had the chart I showed in the CARB episode
03:49:43 2 that showed there were I think zero Masonite door skins
03:49:49 3 sold for a couple years. Then a substantial number were
03:49:52 4 sold to Steves as part of Steves balking at the Jeld-Wen
03:49:57 5 attempted price increase for the CARB compliant door
03:49:59 6 skins.

03:50:00 7 Q Right. The only year in which there was sales of a
03:50:04 8 million door skins a door, or more, was 2011 in all the
03:50:09 9 data you've studied; isn't that right?

03:50:11 10 A From Masonite to Steves.

03:50:12 11 Q From Masonite.

03:50:13 12 A That's what you're talking about?

03:50:15 13 Q Yes.

03:50:16 14 A I could check the data, but I could believe that.

03:50:18 15 That sounds right.

03:50:19 16 Q And then does it sound also right to you that there
03:50:21 17 were only about 115,000 door skins sold in 2007?

03:50:29 18 THE COURT: From who?

03:50:31 19 Q From Masonite to Steves?

03:50:32 20 MR. PFEIFFER: My apologies, Your Honor.

03:50:33 21 A I don't know back then one way or another. I'd have
03:50:35 22 to look at the data.

03:50:36 23 Q Let's -- and you are aware that Masonite is, in fact,
03:50:39 24 today selling door skins to other independent door
03:50:44 25 manufacturers besides Steves, aren't you?

Shapiro - Cross

03:50:48 1 A Well, that's what that 5 percent slice is about.

03:50:52 2 Q Yes.

03:50:53 3 A So the answer is yes, at least as of those data.

03:50:57 4 MR. PFEIFFER: Gail, do you have that 5 percent
03:50:59 5 pie chart available? It would be that page 48.

03:51:14 6 Q You talked about this slide earlier. Do you recall
03:51:17 7 that?

03:51:17 8 A Yes. That's the one I was referring to, the
03:51:19 9 5 percent slice.

03:51:20 10 Q Yes. And you see there, you show Masonite's
03:51:25 11 percentage of door skin sales to independents going from
03:51:28 12 18 percent to 5 percent, right?

03:51:30 13 A Correct.

03:51:34 14 Q How much of that was the result of Steves taking away
03:51:39 15 the million plus door skins it had sold in 2011 and
03:51:44 16 transferring that volume to Jeld-Wen under the long-term
03:51:47 17 sales agreement?

03:51:48 18 A I think a lot of it.

03:51:49 19 Q And, in fact, don't you know that, in fact,
03:51:52 20 Masonite's sales to other independents besides Steves have
03:51:55 21 actually increased in volume since 2011; isn't that right?

03:52:01 22 A Well, again, I can check I tell data. But the market
03:52:04 23 has grown a lot, the overall numbers have grown a lot. So
03:52:07 24 in terms of numbers, that would sound right. In terms of
03:52:10 25 shares, I'd have to check.

Shapiro - Cross

03:52:15 1 Q Toward the --

03:52:16 2 MR. PFEIFFER: Thank you, Gail. You can take
03:52:17 3 that down.

03:52:19 4 Q Toward the end of your direct examination, you talked
03:52:23 5 about the concept of the relevant market. Do you recall
03:52:25 6 that?

03:52:25 7 A Yes, sir.

03:52:27 8 Q And as you mentioned, there are two separate
03:52:29 9 components to that definition. You need to define both
03:52:32 10 the geographic component and the product market component?

03:52:35 11 A Yes.

03:52:35 12 Q Okay. Let's start with the geographic part. I think
03:52:41 13 you said that was door skins used in the United States was
03:52:45 14 how you put that?

03:52:46 15 A Yes, it is.

03:52:47 16 Q Okay. And you agree that all suppliers should be
03:52:51 17 included in the market regardless of their location, don't
03:52:54 18 you?

03:52:56 19 A Yes. Any imported door skins that are used in the
03:52:59 20 United States would be included in market shares.

03:53:05 21 Q And do you agree that a firm that never even enters a
03:53:08 22 given market can, nevertheless, exert competitive pressure
03:53:12 23 on that market?

03:53:15 24 A If you mean by "never enters," they don't actually
03:53:18 25 make sales, then in theory, that can happen, yes.

Shapiro - Cross

Q Okay. And when you're identifying market participants, you also have to include suppliers that are not current producers in a relevant market but that would be very likely -- that would very likely provide rapid supply responses with direct competitive impact in the event of what's called a SSNIP?

A I agree with that.

Q Okay. And a SSNIP is a term antitrust economists use for a significant and non-transitory increase in price, small but significant?

A Yes. That's right.

Q Okay. So in conducting an analysis of the participants from the supplier side in a market, you want to account for firms even if they have a very small share today, but they could grow to become a larger player, right?

A So yes. Although I want to be -- I want to be very clear. You say account for these firms, and I agree with that. And the way I am accounting for them is by measuring the imports. If there are imports coming in, I'm going to count those in my market and in my market shares. If they simply have a facility in Turkey or Romania and they are not sending anything over here, as I look at the market in 2012, there's no adjustment to the market shares needed by virtue of the presence of those

Shapiro - Cross

facilities elsewhere in the world.

Q But in assessing whether a potential entrant can help preserve effective competition, the key thing is not what its market share is at the time you analyze it, but whether the company has sufficient assets to compete effectively. Isn't that true, sir?

A Well, for entry analysis, yes, we want to understand what might happen if prices went up in the United States, whether some imports would come in to help solve the problem. But for measuring market shares, we count the imports that are coming in, and that's what I did.

Q And you do know, in this case, in the industry that we're talking about, door skin suppliers, do regularly ship door skins across the oceans to customers, don't they?

A Well, Masonite, in particular, seems to take -- looks at the worldwide capacity and they do bring in skins from other parts of the world. So the integrated suppliers, there's definitely some -- some door skins moving around, across the ocean, as it were. We're just not seeing that, particularly back in 2012, but even now, for independent door manufacturers.

Q Well, you're aware of Mr. Sam Steves' testimony in this case that before 2012, Steves itself had bought molded door skins from companies overseas. You recall

Shapiro - Cross

that, don't you?

A I do generally recall. But in my mind, it's been such a miniscule amount that it's not competitively significant. So I don't remember the details of what he said.

Q Well, I don't want to be confused. I'm not talking about Teverpan and things after the merger. I'm talking about before the merger happened.

A Right. And I don't remember what he said about imports they might have made before then. But my recollection is that whatever imports were coming in, they were miniscule.

Q Do you offer any quantitative assessment of that in any of the reports that you submitted in this case, sir?

A No. I don't have a number to offer. I looked high and low for evidence about actual imports, and I could find no meaningful quantities of imports coming in prior to -- at that time when I was looking at it.

Q And you're aware, as you said, that Masonite imports actually a significant volume of its skins from overseas into the U.S. for use here, right?

A At times. I don't know the numbers off the top of my head about the shipments. But they definitely move skins around, yes.

Q Does about a third of its door skins coming in from

Shapiro - Cross

03:57:31 1 overseas sound right to you?

03:57:33 2 A I actually don't know as I sit here. No.

03:57:36 3 Q Are you aware that Jeld-Wen has also imported door
03:57:39 4 skins into the U.S. from overseas?

03:57:42 5 A Again, I think they have from some of their
03:57:45 6 facilities. My recollection is they don't have a lot less
03:57:48 7 than Masonite, but I could be corrected on that. I'm not
03:57:51 8 sure.

03:57:51 9 Q And what about CMI? Were you aware that CMI used to
03:57:55 10 export door skins from its Towanda facility to customers
03:57:59 11 overseas?

03:58:03 12 A I do not remember that. No.

03:58:04 13 Q Okay. And you know that Jeld-Wen considers its
03:58:07 14 competition to be global, not just limited to those with
03:58:12 15 market shares right now in the U.S., right?

03:58:14 16 A Well, they compete in other industries. Not just in
03:58:18 17 the United States.

03:58:18 18 Q You recall in the exhibit that had the screwdriver
03:58:22 19 slide, as you referred to it, that there were multiple
03:58:24 20 slides in that deck that you say you reviewed that
03:58:28 21 referred to competition from a global perspective, right?

03:58:31 22 A Yes, generally. Again, they are a -- they have
03:58:36 23 facilities in other countries. They compete in other
03:58:38 24 questions countries. No question about that.

03:58:40 25 Q Did you undertake any analysis of the either stated

Shapiro - Cross

03:58:45 1 or available capacity of any foreign suppliers as part of
03:58:49 2 your analysis in this case?

03:58:52 3 A Nothing beyond the descriptions given in my reports,
03:58:56 4 what I learned about Teverpan and so forth that's
03:58:59 5 described there.

03:59:01 6 Q In fact, you focused on Teverpan rather than any of
03:59:03 7 the other foreign suppliers in your reports, didn't you?

03:59:07 8 A I wouldn't say that. I mean, the various suppliers
03:59:11 9 are mentioned. My understanding is Steves has been
03:59:13 10 farther along with Teverpan in terms of exploring the
03:59:18 11 possibility of imports. So there's somewhat more detailed
03:59:21 12 information about Teverpan, but I discuss the other ones
03:59:24 13 as well.

03:59:24 14 Q Do you recall having discussed the available capacity
03:59:26 15 of any other foreign supplier besides Teverpan, sir?

03:59:29 16 A No. I'd have to check my report on that detail.

03:59:32 17 Q And as you sit here today, you certainly don't
03:59:34 18 remember what you said, if anything, about the available
03:59:37 19 capacity of any foreign supplier, right?

03:59:39 20 A No. I know -- the important concept, I think, is you
03:59:44 21 don't want to look at a foreign supplier's total capacity.
03:59:49 22 They have got to serve their whole market. So you want to
03:59:52 23 look at some more notion of their available capacity and
03:59:54 24 then the extra cost of getting the skins over here and
04:00:00 25 whatever other issues. So the key economic point is you

Shapiro - Cross

04:00:01 1 want to think about available capacity.

04:00:03 2 Q And forgive me if I was imprecise. You haven't set
04:00:06 3 forth any analysis of the available capacity of foreign
04:00:08 4 suppliers, have you?

04:00:09 5 A I don't -- I can't -- I have not separately measured
04:00:12 6 that above and beyond what's in my reports about what's
04:00:15 7 available through the record.

04:00:18 8 Q And you also haven't set forth any kind of analysis
04:00:22 9 about the minimum available capacity that a foreign door
04:00:26 10 skin maker would have to have to be an effective
04:00:30 11 competitor in this market, have you?

04:00:34 12 A Effective competitor. That's not the question I'm
04:00:36 13 asking. So no, I haven't studied that. I'm looking at
04:00:39 14 whether imports are sufficient to replace the lost
04:00:42 15 composition, not whether one importer could be an
04:00:46 16 effective of the United States.

04:00:55 17 Q Professor Shapiro, you agree that to the extent that
04:00:58 18 the Jeld-Wen supply agreement provides Steves with
04:01:02 19 enforceable protections, the adverse effects of the
04:01:06 20 Jeld-Wen/CraftMaster merger would be moderated during the
04:01:11 21 term of the agreement, don't you?

04:01:12 22 A I do.

04:01:12 23 Q And you know that agreement is not set to expire
04:01:16 24 until September 10th, 2021, right?

04:01:19 25 A I know the month. I don't know the day.

Shapiro - Cross

04:01:21 1 Q Okay. September 2021?

04:01:24 2 A Yes, sir.

04:01:24 3 Q You also agree that the magnitude of future events
04:01:27 4 would be significantly influenced by the alternatives open
04:01:32 5 to Steves to obtain interior molded door skins, apart
04:01:37 6 Jeld-Wen, come September 2021, right?

04:01:41 7 A I think the harm to Steves in the future will depend
04:01:45 8 on how effectively they could turn to other sources of
04:01:51 9 supply, including imports.

04:01:53 10 Q The alternatives that may be available to them now --
04:01:57 11 or then?

04:01:58 12 A Yes. I agree with that.

04:01:59 13 Q Okay. And sitting here today, you can't say with
04:02:01 14 certainty what alternatives, in terms of supply of door
04:02:05 15 skins, will be available to Steves come September 2021,
04:02:08 16 can you?

04:02:08 17 A I cannot say that with certainty. It's unknown.
04:02:12 18 Future is uncertain.

04:02:14 19 Q And you're aware that the Turkish door skin maker
04:02:18 20 Teverpan is already selling interior molded door skins to
04:02:22 21 some customers in the U.S., right?

04:02:25 22 A Yes. I believe Excel is purchasing some from them.

04:02:29 23 Q And others as well besides Excel, right?

04:02:31 24 A I don't remember that exactly, but I had Excel in my
04:02:34 25 head.

Shapiro - Cross

04:02:35 1 Q Okay.

04:02:36 2 A Small quantities, but yes.

04:02:40 3 Q How about MJB Wood Group, Patrick Industries? Does

04:02:43 4 that sound familiar?

04:02:44 5 A I'm not sure.

04:02:45 6 Q Okay. Now, you understand that Teverpan is in

04:02:50 7 discussions currently about potentially selling millions

04:02:53 8 of door skins per year to Steves, don't you?

04:02:57 9 A Yes, I am.

04:02:58 10 Q You were here when Mr. Sam Steves testified about

04:03:01 11 that subject, right?

04:03:02 12 A I was not in the courtroom for that. No.

04:03:04 13 Q Have you read that testimony?

04:03:06 14 A I've looked over portions of it, yes.

04:03:10 15 Q And you're also aware, aren't you, that Steves has

04:03:13 16 already, in the past, ordered a flush door skin product

04:03:17 17 from Teverpan? Right?

04:03:18 18 A I am aware of that.

04:03:20 19 Q Okay. And, in fact, were you aware that as of

04:03:25 20 December 21st, 2017, Steves and Teverpan had exchanged a

04:03:31 21 red line draft of a potential new long-term supply

04:03:34 22 agreement?

04:03:36 23 A I understand that there's been discussions, and I

04:03:38 24 think that that's the most recent draft of which I'm

04:03:41 25 aware.

Shapiro - Cross

Q And you never conducted any actual economic analysis to determine the feasibility of Teverpan expanding to meet more of Steves' needs, did you?

A No -- no independent economic analysis. What I have on that is in my report.

Q And you're not offering an opinion that it's unlikely that Steves and Teverpan will reach and formalize an agreement, are you?

A That particular agreement? I can't -- I think they would know better than I about how likely that is.

Q Okay. And you haven't conducted any analysis showing that Teverpan could not have made the same offer that it's making today back in 2013, are you?

A I do not know of Teverpan's situation four or five years ago and how it's different today. I don't know about that.

Q And bottom line, we can agree, you don't know what the Teverpan/Steves relationship is going to look like come September 2021, right?

THE COURT: I think he said something to that effect at least three times in about the last ten minutes. Now, if you have anything else, go ahead and get into it. Otherwise, I think it's about time to close it off.

MR. PFEIFFER: Okay. I do have more to cover, Your Honor.

Shapiro - Cross

04:05:06 1 THE COURT: Get going, please. Asking the same
04:05:09 2 question three different way doesn't help us. They're
04:05:10 3 paying -- the jury is paying attention.

04:05:12 4 MR. PFEIFFER: Yes, Your Honor.

04:05:14 5 Q Professor Shapiro, another European door skin maker,
04:05:18 6 Kastamonu, has also offered to sell millions of door skins
04:05:22 7 per year to Steves. You know that, right?

04:05:24 8 A I know those are discussions. I'm not sure that's a
04:05:29 9 firm offer, but I've heard of it.

04:05:31 10 Q And you haven't conducted any analysis showing that
04:05:32 11 Kastamonu could not have made the same offer, if asked,
04:05:35 12 back in 2013, have you?

04:05:39 13 A I do not know particulars about their situation four
04:05:42 14 or five years ago. Same as I said for Teverpan.

04:05:45 15 Q And same as for Teverpan. You haven't done any
04:05:47 16 analysis about how feasible it would be for Kastamonu to
04:05:50 17 expand its operations to meet more of Steves' needs, have
04:05:53 18 you?

04:05:54 19 A Nothing more than what's in my report on what's
04:05:58 20 available to me in the record.

04:06:06 21 Q And in the case of your work, you didn't look at any
04:06:08 22 information about the size or capitalization of Kastamonu,
04:06:12 23 did you?

04:06:14 24 A I could look. There's some information about them in
04:06:16 25 my report, but I don't have it memorized.

Shapiro - Cross

04:06:19 1 Q Okay. You're also familiar with the door skin maker
04:06:24 2 Yildiz?

04:06:25 3 A I am.

04:06:26 4 Q Okay. And you're aware, then, that it has told
04:06:29 5 Steves that it's pretty eager to sell door skins in the
04:06:34 6 U.S., right?

04:06:35 7 A I don't remember that word. But I know there have
04:06:38 8 been some discussions. I don't think they went as far as
04:06:43 9 the ones with Teverpan.

04:06:45 10 Q And as with Teverpan and Kastamonu, you haven't done
04:06:48 11 any financial analysis of the feasibility of Yildiz
04:06:53 12 expending its operations to serve more of Steves' needs,
04:06:55 13 have you?

04:06:57 14 A Again, some of this is in my report, but nothing more
04:07:00 15 than that.

04:07:02 16 Q Did you conduct any analysis of the pricing
04:07:05 17 competition that CMI experienced from foreign suppliers
04:07:09 18 prior to the merger?

04:07:16 19 A I do not believe that foreign suppliers were a
04:07:19 20 significant competitive influence prior to the merger.

04:07:21 21 Q Okay. And that's part of what you're assuming in
04:07:23 22 this case is that they were not having any pricing
04:07:26 23 influence on CMI prior to the merger. Is that fair to
04:07:29 24 say?

04:07:29 25 A Well, it's not an assumption. I mean, I -- I

Shapiro - Cross

1 inquired about the presence of imports, and they were
2 nonexistent or negligible. And I am not aware of imports
3 having a specific pricing pressure on CMI. So not as I
4 sit here anyhow. If that happened, I don't know about
5 that right now.

6 Q One of the other topics that was discussed earlier
7 today was the subject of Steves potentially, either on its
8 own or with a partner, building a molded door skin
9 manufacturing facility. Do you recall that?

10 A I do.

11 Q Okay. And you have relied on information from Steves
12 and Sons that they believe it's unlikely that they'll be
13 able to build such a facility before the supply agreement
14 with Jeld-Wen expires, right?

15 A Not really, no. That's not right.

16 Q Okay. Is it not the case that you reported that
17 based both on the in-house evaluation and input from GPS,
18 Steves concluded that they are unlikely to be able to
19 build such a facility before the agreement with Jeld-Wen
20 terminates?

21 A I understand that's their view. But I am relying
22 more on Jeld-Wen and Masonite's information about how long
23 it takes to build such a facility and not on Steves'
24 current estimation.

25 Q And did you take into account, in addition to the

Shapiro - Cross

information you say you looked at from Jeld-Wen and Masonite, information prepared by a gentleman named Mr. Ambruz and his company, Global Strategic Partners, in connection with this project?

A I'm aware of that, of their analysis.

Q Okay. And did you take that analysis into account in your opinions in this case?

A Yes, I did.

Q Okay. You wouldn't disregard that, would you?

A No, not at all.

Q Okay. And you didn't conduct an independent analysis of whether Steves can build a door skin facility, did you?

A I did not.

Q Okay. You didn't do any financial analysis, for example, of how much Steves could afford to borrow if it was going to go forward with this plan, did you?

A I did not.

Q But you did hear the testimony from Edward Steves earlier in this case that they have very little debt, didn't you?

A I do not hear that.

Q Were you aware of the statement in Mr. Ambruz's feasibility study that with financing and a partner, Steves' contribution to a door skin plant could be as little as \$16 million?

Shapiro - Cross

04:10:18 1 A How much?

04:10:19 2 Q \$16 million.

04:10:20 3 A I looked through Mr. Ambruz's materials a while ago.

04:10:24 4 I do not remember that specific number.

04:10:37 5 Q You talked earlier this morning in relation to a

04:10:42 6 slide that showed 20 door skin designs. Do you remember

04:10:46 7 that?

04:10:46 8 A I do.

04:10:47 9 Q Okay. And you haven't conducted any analysis showing

04:10:51 10 what door skin styles or sizes an independent door

04:10:55 11 manufacturer must offer to be competitive, have you?

04:10:59 12 A I don't know about "must offer to be competitive." I

04:11:01 13 have analyzed what they actually are purchasing in terms

04:11:06 14 of door skins and so what they're currently using.

04:11:12 15 Q Yes. But you haven't looked at what an independent

04:11:18 16 door manufacturer would need to offer to be competitive in

04:11:20 17 this marketplace, have you?

04:11:22 18 A Well, you're not talking about competitive in the

04:11:24 19 doors market, in selling doors. No, I have not looked at

04:11:29 20 that. I'm just looking at how much of their needs --

04:11:31 21 their current needs could be met with these limited

04:11:34 22 models. That's of the extent of it.

04:11:37 23 Q Right. And you haven't done any analysis, for

04:11:38 24 example, of what range of door skin designs other door

04:11:44 25 skin manufacturers are actually -- door manufacturers,

Shapiro - Cross

rather, are actually offering, right?

A Oh, yes. I have looked at that.

Q So you have an understanding of how many of those 20 designs Excel offers?

A I've looked at those numbers. I don't have them memorized. But they -- in general, the other independent door manufacturers have somewhat fewer designs than Steves, but still far more than the three that seem to be available. More in the 15 to 18 range.

Q In fact, doesn't Lynden buy the vast majority of its doors in the Madison and Monroe lines?

A Lynden is different in that respect. They seem to be more specialized in the Craftsman area. That's correct. So they would be different in that respect in terms of their mix.

Q And you're not offering the opinion that only a supplier that could offer all of those 477 permutations of door skins can be an effective competitor in the door skins market, are you?

A I think you mean in selling doors?

Q No. No. I mean in the door skins market.

A Oh, I misunderstood. Oh, I see. No, I'm not saying that.

Q Okay. Have you done any analysis of how many of the 477 SKUs, or permutations, of door skins Jeld-Wen itself

Shapiro - Cross

04:13:23 1 would have been offer to sale if the merger had not
04:13:29 2 happened?

04:13:29 3 A I don't know that. I probably could get some of that
04:13:32 4 from the data we have, but I certainly don't know the
04:13:35 5 answer to that sitting here.

04:13:38 6 Q That's not something you've offered any analysis or
04:13:40 7 opinion about so far?

04:13:42 8 THE COURT: He doesn't know so he hasn't. Let's
04:13:47 9 go ahead.

04:13:48 10 Q And you do know that Steves itself bought door skins
04:13:52 11 from more than one manufacturer at various times prior to
04:13:53 12 the merger, don't you?

04:13:56 13 A I emphasized that in the context of the CARB episode.

04:13:59 14 Q Did you do an analysis to see which designs
04:14:01 15 overlapped between the manufacturer -- the different
04:14:03 16 manufacturers Steves bought from pre-merger and which did
04:14:07 17 not overlap?

04:14:09 18 A No. I did not separately analyze that.

04:14:11 19 Q So you don't know whether Masonite, for example,
04:14:13 20 offered every one of those 477 that Steves buys now, do
04:14:18 21 you?

04:14:19 22 A I don't know the answer to that.

04:14:21 23 Q Okay.

04:14:29 24 MR. PFEIFFER: Actually, I believe that's my
04:14:31 25 questions for now. Thank you.

04:14:33 1 THE COURT: Would you all like to take a little
04:14:35 2 recess? Okay. We'll take a 15-minute recess.
04:14:43 3 (The jury exited the courtroom.)
04:15:07 4 THE COURT: Take 15 minutes.
04:15:09 5 (Recess taken.)

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04:37:08PM 1 THE COURT: I have a motion from counsel for the
04:37:12PM 2 Kronospan, some fellow in Nashville, complaining about you all
04:37:17PM 3 are using documents that are secret, confidential, protected,
04:37:22PM 4 or whatever. What's the situation on this? Jeld-Wen, you are
04:37:26PM 5 the ones -- they're pointing the fingers at you and saying you
04:37:30PM 6 are doing it, you don't care about the protective order that
04:37:34PM 7 they agreed to or whatever. What's up?

04:37:44PM 8 MS. RATHBUN: Thank you, Your Honor. I'm sorry. I
04:37:48PM 9 just walked in, so I didn't get a chance to hear everything
04:37:51PM 10 that you had said, but my understanding is that we sent
04:37:54PM 11 Kronospan the protective order at the time along with our
04:37:57PM 12 request, our discovery request. They understood that the
04:38:00PM 13 protective order said that it applied during discovery, but for
04:38:05PM 14 trial, the Court needed to decide what protections would be
04:38:10PM 15 added at trial and that Jeld-Wen does not have the ability to
04:38:13PM 16 do that. We don't have the ability to close the court.

04:38:17PM 17 THE COURT: January 20th, 2018. The guy slept on his
04:38:22PM 18 rights, it looks to me like. Jeld-Wen suddenly informed
04:38:26PM 19 Kronospan that the parties to the litigation anticipated using
04:38:31PM 20 Kronospan's confidential information at trial without
04:38:33PM 21 restriction. What are you doing?

04:38:41PM 22 MS. RATHBUN: Your Honor --

04:38:42PM 23 THE COURT: Did you all work this out with them? How
04:38:44PM 24 to you want --

04:38:46PM 25 MS. RATHBUN: We do not oppose the request, Your

04:38:48PM 1 Honor, but we are not able to, ourselves, close the court.

04:38:51PM 2 THE COURT: I'm not going to close the court. What
04:38:53PM 3 is it that you all are thinking -- they seem to think that
04:38:57PM 4 their concern is that you are identifying people who own
04:39:01PM 5 Kronospan. Do we care?

04:39:05PM 6 MS. RATHBUN: Your Honor, my understanding is that
04:39:07PM 7 information is publicly available on the internet already.
04:39:12PM 8 Also, the deposition testimony that we have designated and
04:39:18PM 9 certain documents that we would like to show the jury, we are
04:39:22PM 10 not interested in making sure the jury knows the names of the
04:39:25PM 11 owners of the company. We just want to convey that the owners
04:39:28PM 12 are interested in the project.

04:39:32PM 13 THE COURT: So what?

04:39:34PM 14 MS. RATHBUN: Because --

04:39:36PM 15 THE COURT: Aren't owners always interested in
04:39:39PM 16 projects?

04:39:40PM 17 MS. RATHBUN: Well, I mean, I think that's relevant
04:39:41PM 18 to this case as to whether or not there will be an option for
04:39:44PM 19 Steves in 2021. If the owners of Kronospan are interested in
04:39:48PM 20 this project and would like to move forward in building a
04:39:52PM 21 plant, then that is an important fact that the jury should
04:39:54PM 22 hear.

04:39:54PM 23 THE COURT: You get with this fellow and schedule a
04:39:57PM 24 hearing and tell him to get in here. When are you going to put
04:39:59PM 25 this information on?

04:40:00PM 1 MS. RATHBUN: I'm not sure. Probably within the next
04:40:04PM 2 couple of days.

04:40:06PM 3 THE COURT: Have you even read the motion and the
04:40:09PM 4 order and all that stuff yet?

04:40:11PM 5 MS. RATHBUN: I have not.

04:40:12PM 6 THE COURT: Read it, get in touch with them, work
04:40:15PM 7 something out. If they want a hearing, tell them to be here
04:40:18PM 8 tomorrow. I assume what they will do is retain local counsel,
04:40:22PM 9 or maybe Kronospan is going to fly them up here, but I'll deal
04:40:27PM 10 with it sometime tomorrow. You can work with Ms. Hooper about
04:40:29PM 11 timing after you talk to him. Thank you.

04:40:32PM 12 MS. RATHBUN: Thank you.

04:40:33PM 13 THE COURT: I will have her tell them that you are
04:40:34PM 14 going to be in touch, and you've got to forgive my mind. Your
04:40:39PM 15 name is?

04:40:41PM 16 MS. RATHBUN: Anna Rathbun, Your Honor.

04:40:44PM 17 THE COURT: You tell Ms. Hooper that Ms. Rathbun will
04:40:48PM 18 be in touch with her about scheduling, and Ms. Rathbun is going
04:40:55PM 19 to take care of it with the other lawyers. Are you putting on
04:41:01PM 20 Mr. Steves?

04:41:03PM 21 MR. POMERANTZ: We will, Your Honor, Sam Steves. We
04:41:04PM 22 have a few more questions for Professor Shapiro.

04:41:06PM 23 THE COURT: Very few.

04:41:09PM 24 MR. POMERANTZ: Less than five minutes.

04:41:09PM 25 THE COURT: Are we ready for the jury?

04:41:12PM 1 MR. POMERANTZ: One housekeeping matter which is on
04:41:14PM 2 the slides that I showed Professor Shapiro, they show exhibits,
04:41:18PM 3 and you actually don't know from the record right now which
04:41:21PM 4 exhibits we showed him. They're on the slides, so I can either
04:41:28PM 5 hand the slides to Your Honor and at least the slides can be
04:41:30PM 6 part of the record so we know which exhibits we actually used.

04:41:33PM 7 THE COURT: Did you refer to the slides by number?

04:41:35PM 8 MR. POMERANTZ: Or I can read the exhibit numbers and
04:41:37PM 9 say these are the ones we used during the course of Professor
04:41:41PM 10 Shapiro's --

04:41:42PM 11 THE COURT: You can do it off the record some other
04:41:43PM 12 time.

04:41:44PM 13 MR. POMERANTZ: That would be fine.

04:41:45PM 14 THE COURT: Come in early in the morning and do it.
04:41:50PM 15 Not too early, because the court reporter won't be here.

04:41:52PM 16 MR. DANE: With regard to Edward Steves, Your Honor
04:41:55PM 17 had asked Ms. Zwisler if she would --

04:41:59PM 18 THE COURT: Have you got what it is you were going to
04:42:00PM 19 give me to read, Ms. Zwisler?

04:42:02PM 20 MS. ZWISLER: I'm about to make your life easy. What
04:42:05PM 21 we'd rather do is just call him adverse in our case, so we
04:42:09PM 22 should just go ahead with Mr. Sam Steves.

04:42:13PM 23 THE COURT: That would be fine.

04:42:32PM 24 Ms. Rathbun, this lawyer is about ready to have
04:42:35PM 25 apoplexy. Would you please get hold -- I think it's a him, and

04:42:41PM 1 see if you can aleve his high blood pressure.

04:42:46PM 2 MS. RATHBUN: I will try my best.

04:42:48PM 3 THE COURT: That's why you have that magic telephone.

04:42:52PM 4 MS. RATHBUN: Yes.

04:42:54PM 5 THE COURT: And get a copy of his papers and see if
04:42:56PM 6 you can't work it out. Come on up, Dr. Shapiro.

04:43:06PM 7 Thank you, Ms. Rathbun.

04:43:08PM 8

04:43:08PM 9 (Jury in.)

04:43:08PM 10

04:43:17PM 11 THE COURT: All right. Cross-examination is to be
04:43:20PM 12 brief, I'm told.

04:43:22PM 13 MR. POMERANTZ: Thank you, Your Honor, less than five
04:43:23PM 14 minutes, I think.

04:43:23PM 15

04:43:23PM 16 REDIRECT EXAMINATION

04:43:24PM 17 BY MR. POMERANTZ:

04:43:24PM 18 Q Professor Shapiro, in the questioning by Mr. Pfeiffer, he
04:43:28PM 19 mentioned -- you mentioned that Masonite brings some door skins
04:43:32PM 20 in from outside the United States into THE United States. Do
04:43:36PM 21 you recall that question and answer?

04:43:37PM 22 A I do.

04:43:37PM 23 Q Does Masonite bring those door skins in from its own
04:43:41PM 24 plants outside the United States?

04:43:42PM 25 A Yes, that's my understanding.

Shapiro - Redirect

1126

04:43:44PM 1 Q So they don't bring them in from Teverpan or Yildiz or
04:43:48PM 2 Kastamonu; is that correct?

04:43:49PM 3 A That's correct. Masonite has facilities abroad, and they
04:43:53PM 4 sometimes produce door skins there and ship them to the United
04:43:56PM 5 States for doors here.

04:43:58PM 6 MR. POMERANTZ: Could we have slide 59 brought back
04:44:00PM 7 up.

04:44:06PM 8 Q This is the slide where we have Masonite giving its views
04:44:09PM 9 as to whether Steves could import product. Could you remind
04:44:13PM 10 the jury of what Masonite said here?

04:44:15PM 11 A Masonite said, and this is 2016, that it would be very
04:44:19PM 12 difficult for Steves to import product, referring to door
04:44:22PM 13 skins. It says door facings specifically.

04:44:25PM 14 Q And you understand door facings to mean the same as door
04:44:29PM 15 skins?

04:44:29PM 16 A Yes, sir.

04:44:31PM 17 MR. POMERANTZ: Can we bring up slide 77, please.

04:44:34PM 18 Q So these are the three steps of your analysis, and this is
04:44:38PM 19 your concluding slide where you set forth your conclusions in
04:44:41PM 20 blue with respect to the each of the steps; do you recall that?

04:44:45PM 21 A I do.

04:44:46PM 22 Q Is there anything that happened in your examination by Mr.
04:44:49PM 23 Pfeiffer that affects, in your view, any of the conclusions you
04:44:52PM 24 reached that are set forth on this slide?

04:44:55PM 25 A No.

04:44:56PM 1 MR. POMERANTZ: And if we can turn to slide 78.

04:44:59PM 2 Q Based on anything that happened in Mr. Pfeiffer's
04:45:01PM 3 examination of you, does your answer to this question change at
04:45:05PM 4 all?

04:45:05PM 5 A No.

04:45:06PM 6 Q And what is your answer?

04:45:08PM 7 A I continue to believe that Jeld-Wen's acquisition of CMI
04:45:12PM 8 substantially lessens competition in the market for interior
04:45:17PM 9 molded door skins used in the United States.

04:45:20PM 10 MR. POMERANTZ: Thank you. I have no further
04:45:21PM 11 questions.

04:45:21PM 12 THE COURT: Thank you. Is he going to be excused, or
04:45:24PM 13 does he need to stay around, or what?

04:45:26PM 14 MR. POMERANTZ: Your Honor, we might recall him as a
04:45:30PM 15 rebuttal witness, but we don't know that yet until we see that
04:45:34PM 16 case.

04:45:34PM 17 THE COURT: That's between the two of you. Thank you
04:45:37PM 18 for being with us and giving us your testimony, Dr. Shapiro.

04:45:37PM 19 THE WITNESS: Thank you, Your Honor.

04:45:42PM 20 THE COURT: Your next witness?

04:45:44PM 21 MR. POWELL: Sam Steves, Your Honor.

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04:45:56PM 1 **SAM B. STEVES, II,**

04:45:56PM 2 a witness, recalled at the instance of the plaintiff, having

04:45:56PM 3 been first duly sworn, testified as follows:

04:45:56PM 4 DIRECT EXAMINATION

04:46:13PM 5 BY MR. POWELL:

04:46:13PM 6 Q Mr. Steves, just a couple of questions to cover a little

04:46:31PM 7 territory that we didn't cover when you were last here; all

04:46:33PM 8 right?

04:46:33PM 9 A Yes, sir.

04:46:34PM 10 Q Remind the jury, please, your position with the company.

04:46:37PM 11 A I'm president and chief operating officer of the company.

04:46:41PM 12 Q In those roles, sir, what is your primary responsibility

04:46:46PM 13 insofar as running the company's business?

04:46:48PM 14 A My day to day is managing all of the sales and then all of

04:46:55PM 15 the production of everything that we sell.

04:46:57PM 16 Q Are you familiar with each of the lines of business of

04:47:01PM 17 Steves and Sons?

04:47:02PM 18 A I am.

04:47:03PM 19 Q What is your principal line of business?

04:47:06PM 20 A Molded interior doors.

04:47:09PM 21 Q I know you said this earlier in your testimony, but please

04:47:12PM 22 remind the jury, of all the revenue, all the money that the

04:47:16PM 23 company takes in on an annual basis, approximately what

04:47:19PM 24 percentage of that comes from the sale of molded interior

04:47:22PM 25 residential doors?

Sam Steves - Direct

1129

04:47:23PM 1 A Approximately 70 percent of our total revenue.

04:47:27PM 2 Q You have a few other lines of business, though; correct?

04:47:31PM 3 A We do.

04:47:31PM 4 Q What are they?

04:47:32PM 5 A We have an exterior steel and fiberglass facility,

04:47:38PM 6 relatively small by industry standards.

04:47:40PM 7 Q When you say exterior, you mean exterior door?

04:47:43PM 8 A Right. It would be, for instance, your front door or your

04:47:46PM 9 back door.

04:47:47PM 10 Q What else?

04:47:48PM 11 A And then we have as a separate division that also sells

04:47:52PM 12 molded interior doors what we call our home center division

04:47:56PM 13 that sells exclusively to Home Depot.

04:47:59PM 14 Q Anything else?

04:48:01PM 15 A That's it.

04:48:02PM 16 Q Focusing on those, that is the lines of business other

04:48:06PM 17 than the sales of molded interior residential doors, over the

04:48:11PM 18 last few years, have they been profitable?

04:48:13PM 19 A You are asking me to exclude whatever involves interior

04:48:20PM 20 molded doors?

04:48:21PM 21 Q Yes, sir, exclude those.

04:48:22PM 22 A They are not profitable.

04:48:25PM 23 THE COURT: Your home center sales to Home Depot does

04:48:29PM 24 not include molded interior doors?

04:48:32PM 25 THE WITNESS: No, sir, it does.

Sam Steves - Direct

1130

04:48:36PM 1 Q At the end of your testimony --

04:48:38PM 2 THE COURT: Is that all you sell to Home Depot from
04:48:41PM 3 your home center business?

04:48:42PM 4 THE WITNESS: The genesis of the business started
04:48:45PM 5 with interior molded doors and, 15 years ago, even flush doors.
04:48:50PM 6 That now has been taken out of the Home Depot, and that turned
04:48:53PM 7 into door units, interior door units, again molded doors, and
04:48:58PM 8 then in the last maybe two to three years, we've earned a
04:49:04PM 9 significant -- by our standards -- amount of exterior door
04:49:10PM 10 business at Home Depot. These are exterior doors as I've
04:49:14PM 11 described earlier for maybe a front or back door.

04:49:19PM 12 Q If, in September of 2021, Mr. Steves, you no longer have a
04:49:24PM 13 supply of molded interior door skins, what happens to your
04:49:28PM 14 business?

04:49:29PM 15 A Our -- we're done. We will be out of business.

04:49:35PM 16 MR. POWELL: Your Honor, I may I confer with my
04:49:39PM 17 colleagues for a moment?

04:49:39PM 18
04:49:41PM 19 (Counsel conferring.)

04:49:41PM 20
04:49:54PM 21 Q One last question, Mr. Steves. If you had only a limited
04:50:01PM 22 supply of molded interior door skins such as those presently
04:50:05PM 23 offered by Teverpan and the other foreign suppliers that we
04:50:08PM 24 talked about, if that's all you had, what would happen to your
04:50:12PM 25 business for the sale of molded interior residential doors?

Sam Steves - Direct

1131

04:50:17PM 1 A Well, it would be the same answer, and to put it into
04:50:21PM 2 context, I've heard a lot of testimony about Teverpan,
04:50:25PM 3 Kastamonu, and Yildiz. The only supplier that we have
04:50:30PM 4 qualified, from a quality perspective, so far is Teverpan. We
04:50:34PM 5 can't get an agreement from them. And the only thing they have
04:50:39PM 6 of six-panel product, which is the part that the Home Depot
04:50:43PM 7 buys so much of, is five possible SKUs. Those would be five
04:50:50PM 8 possible sizes out of the 11 we offer. So if we only had those
04:50:56PM 9 five, there's no way anyone is going to continue to do business
04:51:01PM 10 with us, so we're through.

04:51:05PM 11 Q Could you survive by selling only flush doors?

04:51:09PM 12 A No, sir.

04:51:12PM 13 MR. POWELL: Thank you, Mr. Steves. That's all the
04:51:14PM 14 questions I have. Mr. Pfeiffer may have a few for you.

04:51:18PM 15 MR. PFEIFFER: Your Honor, may we approach briefly?

04:51:28PM 16

04:51:28PM 17 (Discussion at sidebar as follows:)

04:51:28PM 18

04:51:31PM 19 MS. ZWISLER: In light of the fact that Mr. Pfeiffer
04:51:32PM 20 was getting ready to cross Carl Shapiro, I got ready to cross
04:51:37PM 21 Mr. Sam Steves very briefly. So would you give us your
04:51:40PM 22 permission to tag-team the cross?

04:51:44PM 23 THE COURT: Do what now?

04:51:45PM 24 MS. ZWISLER: Well, I'm prepared to cross Mr. Sam
04:51:48PM 25 Steves because he was crossing Carl Shapiro after we decided

04:51:52PM 1 that we were going to have Sam come back. So I'm asking
04:51:56PM 2 permission, if it's okay with them, or even if it isn't, that I
04:52:00PM 3 could cross Sam right now and not Mr. Pfeiffer.

04:52:05PM 4 THE COURT: You mean because he cross-examined him
04:52:07PM 5 earlier?

04:52:08PM 6 MS. ZWISLER: Yes.

04:52:09PM 7 THE COURT: But you're not talking about doing two
04:52:11PM 8 people today.

04:52:12PM 9 MS. ZWISLER: No, no.

04:52:13PM 10 THE COURT: Sure. Absolutely.

04:52:16PM 11 MS. ZWISLER: Thank you, Your Honor.

04:52:17PM 12

04:52:17PM 13 CROSS-EXAMINATION

04:52:17PM 14 BY MS. ZWISLER:

04:52:27PM 15 Q Good afternoon, Mr. Steves. I'm subbing for Mr. Pfeiffer
04:52:30PM 16 today.

04:52:31PM 17 A Hello.

04:52:32PM 18 Q As I understood your testimony, you said that because of
04:52:37PM 19 the limited supply, you would go out of business in 2021; is
04:52:41PM 20 that correct?

04:52:41PM 21 A At the end -- when the supply agreement terminated and we
04:52:46PM 22 no longer had door skins to fill our orders, we would have no
04:52:51PM 23 choice but to go out of business.

04:52:53PM 24 Q And your testimony on that subject takes into account the
04:52:57PM 25 idea that you can't build your own door skin plant; is that

04:53:01PM 1 correct?

04:53:01PM 2 A That's correct.

04:53:02PM 3 Q Now, you are not saying you can't afford to build that
04:53:06PM 4 plant, are you?

04:53:07PM 5 A That's an element of one of our concerns.

04:53:11PM 6 Q Okay.

04:53:12PM 7 THE COURT: Wait a minute. I think the question was,
04:53:14PM 8 are you saying you can't afford it?

04:53:17PM 9 THE WITNESS: The nuts and bolts of that would be no,
04:53:19PM 10 today, we cannot afford that.

04:53:21PM 11 Q You had a business partner named Proteak, didn't you, sir?

04:53:24PM 12 A They were not a business partner, no, ma'am.

04:53:28PM 13 Q You had a deal, you testified on direct, with Proteak that
04:53:31PM 14 you -- on cross, rather, that you walked away from because they
04:53:34PM 15 wanted to be a majority shareholder and put more money into the
04:53:38PM 16 deal, and you would be a minority; isn't that true?

04:53:41PM 17 A No, ma'am.

04:53:42PM 18 MR. POWELL: Objection. He did not say he had a deal
04:53:45PM 19 with Proteak. She's mischaracterizing his direct testimony.

04:53:49PM 20 THE COURT: Why don't you just ask the question
04:53:50PM 21 another way. That's an objection to the form of the question
04:53:53PM 22 that's sustained.

04:53:54PM 23 Q You came up to have an agreement -- you tried to make an
04:54:00PM 24 agreement with Proteak to have them be a partner with you in
04:54:03PM 25 building a door skin plant; isn't that true?

04:54:05PM 1 A We did.

04:54:06PM 2 Q And Proteak was very interested, you testified; correct?

04:54:10PM 3 A They were.

04:54:11PM 4 Q And you hold them in high regard; correct?

04:54:13PM 5 A Yes, we do.

04:54:14PM 6 Q And the deal broke down over the deal structure, not any

04:54:19PM 7 concerns over the viability or profitability of the deal;

04:54:21PM 8 correct?

04:54:21PM 9 A I think the deal broke down when we received an email from

04:54:25PM 10 Proteak telling them they wanted to pause any interest in this

04:54:30PM 11 program because of a subpoena from Jeld-Wen. So that's what

04:54:33PM 12 broke the deal down.

04:54:34PM 13 Q And you testified on direct they cooled to the idea of a

04:54:38PM 14 partnership only after you balked at the 33 percent share that

04:54:41PM 15 they wanted to assign in that arrangement; correct?

04:54:44PM 16 A But I also testified in front of this jury that it wasn't

04:54:49PM 17 our not wanting to be a minority shareholder. Of course we

04:54:54PM 18 wanted to maintain control, because we didn't want to find

04:54:57PM 19 ourselves, or I didn't want my great grandchildren to find

04:55:00PM 20 themselves in this same situation again. So what I

04:55:02PM 21 testified -- if you'll allow me -- pardon me.

04:55:05PM 22 THE COURT: Easy, easy, easy. Settle down.

04:55:09PM 23 THE WITNESS: What I want to say is, when Proteak

04:55:12PM 24 wanted -- and I testified to this effect. When Proteak wanted

04:55:16PM 25 to invest more money, it wasn't as if they wanted a bigger

04:55:20PM 1 share. They wanted a bigger deal. They wanted a bigger plant,
04:55:25PM 2 and we didn't want to make the plant as big as they wanted to
04:55:29PM 3 make it, because we didn't need to make it that large. In that
04:55:32PM 4 way, we didn't need to have to afford that much money.

04:55:36PM 5 Q They were a viable option initially; correct?

04:55:38PM 6 A They certainly were.

04:55:39PM 7 Q And you have no idea whether, after this lawsuit is over,
04:55:43PM 8 if indeed it is correct that they balked because we subpoenaed
04:55:46PM 9 them to find out what they were doing with you, whether they'll
04:55:48PM 10 come back and have another deal with you; right?

04:55:51PM 11 A You happen to have an email that they supplied saying that
04:55:54PM 12 they wanted to pause this program because of your subpoena.

04:55:58PM 13 Q They didn't say they would never do business with you at
04:56:04PM 14 all, did they?

04:56:07PM 15 A They told us they did not want to discuss this deal
04:56:11PM 16 because of the subpoena that they had received from you.
04:56:15PM 17 That's when we stopped talking.

04:56:18PM 18 MS. ZWISLER: Move to strike the answer as
04:56:19PM 19 nonresponsive.

04:56:20PM 20 Q My question is --

04:56:20PM 21 THE COURT: Just a minute. Do you want a ruling on
04:56:23PM 22 it, or do you want to rule, too?

04:56:25PM 23 MS. ZWISLER: Sorry, I'd like a ruling.

04:56:27PM 24 THE COURT: Overruled, but listen to the question and
04:56:30PM 25 just relax.

04:56:32PM 1 Q You have no idea whether, after this lawsuit is over and
04:56:36PM 2 it's not hanging over the head of your company or them, whether
04:56:40PM 3 they'll come back to the table and work with you again to think
04:56:43PM 4 about whether you guys could be partners in a door skin plant;
04:56:46PM 5 correct?

04:56:47PM 6 A I have no idea, that's correct.

04:56:49PM 7 Q Thank you. Now, Masonite, your conclusion that you are
04:56:57PM 8 going to go out of business is based upon your assessment that
04:57:03PM 9 Masonite's willingness to sell to you is at too high a price;
04:57:09PM 10 correct?

04:57:10PM 11 A Well, it's at too high a price and an unwillingness to
04:57:15PM 12 enter into a long-term supply agreement with Steves and Sons.

04:57:18PM 13 Q So that's Mr. Fred Lynch's policy right now, isn't it?

04:57:24PM 14 A That's my understanding, yes, ma'am.

04:57:26PM 15 Q Now, in 2011, Fred Lynch had a different policy, didn't
04:57:31PM 16 he?

04:57:31PM 17 A He did.

04:57:32PM 18 Q Yeah, because he was selling skins directly to you without
04:57:36PM 19 a long-term supply agreement; correct?

04:57:38PM 20 MR. POWELL: Excuse me, Ms. Zwisler. I object to
04:57:41PM 21 this line of questioning. It's beyond the scope.

04:57:43PM 22 THE COURT: I don't think it is.

04:57:45PM 23 A Will you ask the question again, please.

04:57:49PM 24 Q In 2011, you were buying 1.5 million door skins a year
04:57:54PM 25 from Masonite without a long-term supply agreement; correct?

04:57:57PM 1 A We did not have a long-term supply agreement with them at
04:58:00PM 2 the time, that's correct.

04:58:01PM 3 Q And you bought 1.5 million skins from Masonite; correct?

04:58:05PM 4 A We did.

04:58:06PM 5 Q And then sometime later, apparently, Mr. Lynch changed his
04:58:10PM 6 view about how to run Masonite's business with independents;
04:58:14PM 7 correct?

04:58:14PM 8 A He did.

04:58:15PM 9 Q And that was sometime in 2014 when he decided to
04:58:19PM 10 de-emphasize that business or something; correct?

04:58:21PM 11 A I believe that's what I've heard in this courtroom, yes,
04:58:24PM 12 ma'am.

04:58:24PM 13 Q And you have no idea, do you, whether he will maintain his
04:58:28PM 14 current policy or switch back to what he did in 2011, do you?

04:58:33PM 15 A That's what the scarecrow does.

04:58:37PM 16 THE COURT: Wait a minute. What's what the scarecrow
04:58:40PM 17 does?

04:58:43PM 18 THE WITNESS: (Indicating.)

04:58:43PM 19 Q Mr. Lynch might decide next year, I'm going to change my
04:58:47PM 20 mind, I'm going to do what I did in 2011, I'm going to sell
04:58:50PM 21 skins on the open market again; correct?

04:58:52PM 22 A He could.

04:58:53PM 23 Q And you know he's been a CEO for long time, hasn't he?

04:58:57PM 24 A He has.

04:58:57PM 25 Q And he might decide to retire; correct?

04:59:01PM 1 A I have no idea -- the only thing I know about him is he's
04:59:05PM 2 a Villanova fan, and I'm from Virginia. So that's it.

04:59:09PM 3 Q But my point, to be serious, is he's not going to be CEO
04:59:14PM 4 forever, is he?

04:59:14PM 5 A Ma'am, I know he's significantly younger than me, so I
04:59:17PM 6 just -- I have no idea how long he's going to be CEO.

04:59:21PM 7 Q And Masonite could decide to change out CEOs; correct?

04:59:26PM 8 A Of course.

04:59:27PM 9 Q You have no idea whether, in 2021, either Mr. Lynch or
04:59:31PM 10 some new CEO of Masonite will decide to change its policy and
04:59:36PM 11 its entire business approach to the independents; isn't that
04:59:39PM 12 true?

04:59:39PM 13 A That's true.

04:59:41PM 14 Q Now, Teverpan and Kastamonu, I understand your testimony
04:59:45PM 15 that part of your -- your testimony that you're going to go out
04:59:52PM 16 of business without a supply is based on the fact that today,
04:59:55PM 17 Teverpan and Kastamonu have too few designs and the quality
04:59:59PM 18 isn't acceptable to you; is that correct?

05:00:01PM 19 A I believe we've qualified Teverpan's on the last half a
05:00:07PM 20 container; however, we have not been able to qualify three
05:00:12PM 21 shipments so far from Kastamonu.

05:00:13PM 22 Q So I'll take them separately then. Right now, Teverpan
05:00:16PM 23 skins are acceptable to you; correct?

05:00:18PM 24 A Yes, they are.

05:00:19PM 25 Q So if they invested in more molds and had enough molds to

05:00:24PM 1 satisfy your needs right now, Teverpan would be a viable
05:00:28PM 2 option, and you wouldn't go out of business in 2021; correct?
05:00:32PM 3 A To supply the over 10 million door skins that we purchased
05:00:36PM 4 in 2017? Is that your question?
05:00:39PM 5 Q July 2021.
05:00:40PM 6 A So they're going to install another line in Turkey?
05:00:43PM 7 Q My question is -- just stay with me on --
05:00:46PM 8 A But you just asked me if they're going to buy more dies.
05:00:49PM 9 Q If they buy more dies -- maybe the way to ask it is, you
05:00:52PM 10 have no idea what Teverpan is going to be selling in 2021, do
05:00:56PM 11 you?
05:00:56PM 12 A I do not.
05:00:57PM 13 Q You don't know if they're going to have three dies, five
05:01:00PM 14 dies, or seven; correct?
05:01:01PM 15 A They may have zero. I don't know.
05:01:03PM 16 Q Right. And Kastamonu, the same thing. Your testimony
05:01:06PM 17 that you're going to go out of business in 2021 without a
05:01:10PM 18 supply is based on your evaluation of Kastamonu today; correct?
05:01:14PM 19 A Well, the fact that they've gone backwards is disturbing.
05:01:18PM 20 They're down to two dies to be able to supply us the tests that
05:01:23PM 21 we need. So I'm not putting a tremendous amount of faith in
05:01:27PM 22 their even being able to supply us a limited amount that we
05:01:30PM 23 were seeking.
05:01:31PM 24 Q Thank you, but I'd like an answer to my question which is
05:01:31PM 25 --

05:01:31PM 1 A Okay.

05:01:34PM 2 Q -- it's based upon your evaluation of the quality of

05:01:37PM 3 Kastamonu today; yes?

05:01:39PM 4 A We have not been able to qualify Kastamonu. That means

05:01:43PM 5 that their quality does not meet an acceptable standard. We

05:01:48PM 6 heard that from Mr. Fancher.

05:01:49PM 7 Q So to go back to my question, the evaluation that you're

05:01:53PM 8 going to go out of business because you don't have an

05:01:56PM 9 alternative supply is based on your assessment that today,

05:01:59PM 10 Kastamonu's quality is not sufficient; correct?

05:02:02PM 11 A That's correct.

05:02:02PM 12 Q And you have no idea what quality improvements Kastamonu

05:02:07PM 13 might make that would make them an acceptable source of supply

05:02:10PM 14 either before 2021 or after, do you?

05:02:13PM 15 A It would require that their quality be certified and that

05:02:17PM 16 they have the right assortment for what our customers buy,

05:02:21PM 17 because we can't tell our customers what to buy.

05:02:24PM 18 Q And you can't tell whether or not they're going to have

05:02:26PM 19 that or not. I understand what you're saying, but you can't

05:02:29PM 20 tell whether or not they're going to have it or not right now,

05:02:32PM 21 can you?

05:02:32PM 22 A No, ma'am.

05:02:33PM 23 Q And you got the notice of termination from Mr. Hachigian

05:02:37PM 24 in September of 2014; correct?

05:02:39PM 25 A Yes, ma'am.

05:02:40PM 1 Q At that time, you had seven years to figure out what to
05:02:43PM 2 do; correct?

05:02:43PM 3 A Yes, ma'am.

05:02:44PM 4 Q And one of the reasons that that seven years is in that
05:02:48PM 5 contract is so that you would have time if Jeld-Wen terminated
05:02:53PM 6 you to figure this out; right?

05:02:54PM 7 A That was contemplated, yes, ma'am.

05:02:56PM 8 Q And, now, you've still got three and a half more years;
05:03:00PM 9 correct?

05:03:00PM 10 A That's correct.

05:03:01PM 11 Q And your own studies have shown, for example,
05:03:05PM 12 Dieffenbacher thinks that they can build this thing for you in
05:03:09PM 13 a couple or three years; correct?

05:03:10PM 14 A You've mischaracterized that. They said they can build
05:03:13PM 15 the equipment in two years. I testified under oath with Mr.
05:03:18PM 16 Pfeiffer that it would take over four years if all the die
05:03:21PM 17 manufacturers we were aware of in the world could manufacture
05:03:24PM 18 the dies starting tomorrow morning.

05:03:27PM 19 So I don't think that's true, and that's not even talking
05:03:30PM 20 about the design, the permits that are required, and we've seen
05:03:34PM 21 this testimony from folks that know a lot more about this than
05:03:37PM 22 I do, Ms. Zwisler.

05:03:38PM 23 Q But you don't know where they're going to be in 2021
05:03:42PM 24 either, do you?

05:03:43PM 25 A Unless there become more months in a year, I can't see it

05:03:48PM 1 happening in time.

05:03:48PM 2 Q If you had started with some of this in 2014 -- well --

05:03:54PM 3 A Would've, should've, could've --

05:03:56PM 4 THE COURT: Wait a minute. Think we don't need to go
05:03:59PM 5 there.

05:04:00PM 6 Q I'll ask one final question which is, nobody can predict
05:04:04PM 7 the future; correct?

05:04:05PM 8 A No, ma'am.

05:04:07PM 9 Q And you don't have any basis, really, to tell this Court
05:04:11PM 10 that you are going to go out of business without being able to
05:04:14PM 11 predict what's going to be going on with building a door skin
05:04:17PM 12 plant, Masonite, Tever, and Kastamonu; correct?

05:04:21PM 13 A Without this being a flippant answer, and I want to
05:04:24PM 14 qualify it this way, because I thought about it a lot. I've
05:04:28PM 15 studied this as hard as I know how to study it. It's critical
05:04:33PM 16 to my family, to my business, to my employees, some that have
05:04:38PM 17 been there for four generations, that we figure this out.

05:04:41PM 18 So I've learned a lot, and I feel as certain that we're
05:04:46PM 19 going to have a door skin supply after September 2021 as I am
05:04:52PM 20 that Disney is going to have a theme park in North Korea. It's
05:04:57PM 21 just not going to happen.

05:04:58PM 22 Q Well, you don't know that, because you don't know any of
05:05:01PM 23 the things that I just asked you. You think so, but that's
05:05:05PM 24 based on your assessment of things today; correct, sir?

05:05:07PM 25 A From what I know, yes, ma'am.

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05:05:09PM 1 Q Based on what the situation is today and not what it's
05:05:11PM 2 going to be in 2021; correct?

05:05:13PM 3 A Based on what I know, and I know -- all I know is all I
05:05:18PM 4 know.

05:05:18PM 5 Q You were at your brother's deposition in August, were you
05:05:22PM 6 not?

05:05:22PM 7 A For parts of it, yes, ma'am.

05:05:23PM 8 Q And would you agree with him that it's an exaggeration
05:05:26PM 9 that you would go immediately out of business in 2021?

05:05:29PM 10 MR. POWELL: Objection, Your Honor. Now she's --

05:05:32PM 11 THE COURT: Overruled.

05:05:34PM 12 A So reask the question, please.

05:05:36PM 13 Q Yes. You were at your brother's deposition in August of
05:05:40PM 14 2017; correct?

05:05:42PM 15 A For parts of it. I wasn't -- as you know, I wasn't there
05:05:45PM 16 the entire time.

05:05:46PM 17 Q So you know he testified that you would not go out of
05:05:49PM 18 business immediately in 2021 even if you lost this lawsuit;
05:05:52PM 19 correct?

05:05:53PM 20 MR. DANE: Objection, Your Honor. That is a
05:05:54PM 21 mischaracterization of the deposition testimony she is
05:05:57PM 22 referring to.

05:05:58PM 23 Q Do you remember that testimony, sir?

05:05:58PM 24 THE COURT: May I see it? I can't rule on it unless
05:06:03PM 25 I see it.

05:06:22PM 1 (Discussion at sidebar as follows:)

05:06:22PM 2

05:06:39PM 3 THE COURT: What line and page are you talking about?

05:06:41PM 4 MR. DANE: I'm looking at 661.

05:06:44PM 5 THE COURT: August 16th, 2017 deposition, page what?

05:06:48PM 6 MR. DANE: 661, Your Honor, and what Mr. Steves is

05:06:51PM 7 referring to, is he's saying that it would be an exaggeration

05:06:55PM 8 to say that they would go out of business immediately upon

05:06:58PM 9 losing the lawsuit, because they would still have the supply

05:07:01PM 10 agreement that would last for a few years, and the Court,

05:07:05PM 11 they're hoping, would protect them.

05:07:07PM 12 Ms. Zwisler said that he said that they would go out

05:07:09PM 13 of business immediately --

05:07:15PM 14 MS. ZWISLER: September 21.

05:07:17PM 15 MR. DANE: September 21, which is not what he said.

05:07:18PM 16 It's a complete mischaracterization, and to impeach a different

05:07:23PM 17 witness upon a mischaracterization --

05:07:23PM 18 THE COURT: Easy, easy, big fellow. You need to get

05:07:38PM 19 in here and say what you said so the court reporter can hear.

05:07:41PM 20 MS. ZWISLER: I'll withdraw the question.

05:07:44PM 21 THE COURT: The question is withdrawn.

05:07:46PM 22 MR. DANE: Your Honor.

05:07:47PM 23 THE COURT: I'll give an instruction.

05:07:48PM 24 MR. DANE: Your Honor, I think that is extremely

05:07:50PM 25 improper behavior by Ms. Zwisler. She knows that that

05:07:50PM 1 testimony is not anything close to what she said it was. That
05:07:57PM 2 is improper behavior.

05:07:57PM 3 THE COURT: All right, we'll deal with that off the
05:08:01PM 4 record -- I mean out of the presence --

05:08:03PM 5 MR. DANE: The reason I will say this, Your Honor, is
05:08:05PM 6 they did it in briefing, and we pointed it out in briefing, and
05:08:07PM 7 she repeated it here at trial. That is unconscionable.

05:08:10PM 8 THE COURT: We'll deal with it later.

05:08:10PM 9

05:08:10PM 10 (End of sidebar discussion.)

05:08:18PM 11

05:08:18PM 12 THE COURT: Ladies and gentlemen, the question has
05:08:19PM 13 with withdrawn, and the fact of the matter is that the
05:08:25PM 14 witness -- the fellow didn't say what it is that the question
05:08:30PM 15 was as it was presented in the question after having looked at
05:08:36PM 16 the question. Counsel realized the error of her ways and
05:08:41PM 17 withdrew the question. So there isn't any evidence of that
05:08:46PM 18 kind in here.

05:08:48PM 19 MS. ZWISLER: Thank you, Mr. Steves.

05:08:50PM 20 THE WITNESS: Thank you, Ms. Zwisler.

05:08:52PM 21 THE COURT: All right, is there anything else?

05:08:53PM 22 MR. POWELL: No, sir, not from me.

05:08:55PM 23 THE COURT: All right, you may step down.

05:08:57PM 24 THE WITNESS: Thank you.

05:09:08PM 25 THE COURT: All right.

05:09:12PM 1 MR. POWELL: We have Mr. Tucker ready to go, Your
05:09:15PM 2 Honor, if you're ready to go.

05:09:16PM 3 THE COURT: Well, can you ask Mr. Tucker things that
05:09:20PM 4 we can productively use the jury's time for and I can deal with
05:09:25PM 5 the other aspects of it in a little bit?

05:09:29PM 6 MR. DANE: We can, Your Honor.

05:09:30PM 7 THE COURT: Let's do it that way then.

05:09:38PM 8

9 **AVRAM TUCKER,**
10 a witness, called at the instance of the plaintiff, having been
11 first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. DANE:

05:11:18PM 14 Q Good afternoon, Mr. Tucker.

05:11:19PM 15 A Good afternoon.

05:11:20PM 16 Q Can you tell the jury what you were asked to do in this
05:11:25PM 17 case?

05:11:25PM 18 A Yes. I was asked to focus on Steves' damages related to
05:11:29PM 19 some of the issues in this case, primarily focusing on
05:11:34PM 20 overcharges by Jeld-Wen for door skins to Steves and also
05:11:38PM 21 looking at the amount of damages related to quality issues.

05:11:42PM 22 Q Now, let me ask you some background information. Where
05:11:46PM 23 did you graduate from college, sir?

05:11:48PM 24 A I graduated from George Washington University in
05:11:50PM 25 Washington, D.C. I got a Bachelor of Business Administration

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05:11:54PM 1 degree with a major in accounting, and I studied accounting,
05:11:58PM 2 economics, and finance.

05:11:58PM 3 Q Can you briefly describe your professional background up
05:12:02PM 4 until your current position?

05:12:03PM 5 A I started working in Washington, D.C., at an international
05:12:08PM 6 public accounting firm called Arthur Andersen. I did what we
05:12:09PM 7 call financial statement audits, special purpose audits, and I
05:12:13PM 8 also consulted with companies on how to improve their
05:12:16PM 9 procedures and controls.

05:12:18PM 10 I then moved to the West Coast, and for the next 35 or so
05:12:22PM 11 years, I have focused on business and litigation consulting,
05:12:26PM 12 business consulting being working on matters helping companies
05:12:30PM 13 dealing with regulations or improving their procedures, and
05:12:33PM 14 then I do a substantial amount of litigation work like this
05:12:36PM 15 case.

05:12:37PM 16 Q Do you have an occasion to do any teaching?

05:12:39PM 17 A Yes. I am an adjunct professor at Stanford University in
05:12:44PM 18 Palo Alto. I teach every year, for the last 20 years, two
05:12:49PM 19 courses a year to graduate engineering students. Although
05:12:52PM 20 they're engineering students, I focus on financial and
05:12:55PM 21 accounting and finance information.

05:12:58PM 22 Q Do you serve on the boards of any institutions?

05:13:01PM 23 A I'm on the board of trustees at George Washington
05:13:05PM 24 University in Washington, D.C. The board there provides
05:13:08PM 25 governance over the operations of the university.

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05:13:11PM 1 Q Do you hold any professional certifications, sir?

05:13:14PM 2 A I have three certifications. I've been a certified public
05:13:18PM 3 accountant since 1978. I've also -- I'm certified in financial
05:13:22PM 4 forensics, which is what I do in my business, and I'm also a
05:13:27PM 5 chartered global management accountant. The later two
05:13:30PM 6 designations are given by American Institute of Certified
05:13:34PM 7 Public Accountants which is the regulatory body that oversees
05:13:38PM 8 CPAs.

05:13:40PM 9 Q You used a term there, financial forensics. What does
05:13:43PM 10 that mean?

05:13:43PM 11 A I think I said forensic accounting, but either way, both
05:13:47PM 12 work. Forensic accounting are or financial forensics is the
05:13:52PM 13 study of financial and operational information for
05:13:55PM 14 investigative purposes, often in the context of litigation like
05:13:59PM 15 this case.

05:14:00PM 16 Q When you refer to giving an opinion on damages, what do
05:14:06PM 17 you mean by damages?

05:14:07PM 18 A Damages is the financial harm of a company that relates to
05:14:13PM 19 the conduct of another company. So in a case where a company
05:14:16PM 20 says that some other company did something wrong, the financial
05:14:20PM 21 harm is the increased costs that they might have spent or the
05:14:24PM 22 lost profits that they might have incurred from the conduct.

05:14:28PM 23 Q Have you testified in court in other cases?

05:14:32PM 24 A I've testified many times on accounting, finance, and
05:14:36PM 25 economic issues, particularly damages. I've testified in civil

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05:14:41PM 1 courts like this, both federal and state courts. I've
05:14:44PM 2 testified in various administrative proceedings. I've
05:14:48PM 3 testified in the United States Bankruptcy Court in some of the
05:14:52PM 4 regulatory industry proceedings, and I've testified in
05:14:54PM 5 arbitrations throughout the United States and around the world.

05:14:57PM 6 Q And in any of those other engagements, have you testified
05:15:01PM 7 on issues such as those involved in this case such as
05:15:05PM 8 overcharges or defect claims?

05:15:06PM 9 A Yes. A number of the cases that I've worked on have
05:15:09PM 10 involved defect of products and also other matters like breach
05:15:13PM 11 of contract where I would be studying companies' increased
05:15:17PM 12 costs related to a particular event or occurrence.

05:15:20PM 13 Q And have you testified on behalf of both plaintiffs and
05:15:24PM 14 defendants?

05:15:24PM 15 A I've regularly worked for both plaintiffs and defendants
05:15:28PM 16 and testified for plaintiffs and defendants.

05:15:29PM 17 Q Can you estimate about how many times, over the years,
05:15:31PM 18 you've testified as an expert on damages issues?

05:15:34PM 19 A I would say in what I call civil courts, like a state or
05:15:38PM 20 federal court like this, and jury trials, probably about 40
05:15:42PM 21 times, and then many other times in arbitrations and other
05:15:45PM 22 proceedings.

05:15:45PM 23 Q And do you -- besides the litigation work that you do, do
05:15:51PM 24 you do other type of consulting work?

05:15:52PM 25 A Yes. The most recent years, there's been a lot of

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05:15:55PM 1 litigation. I spend a considerable amount of my time on
05:15:59PM 2 litigation, but I regularly perform general business consulting
05:16:02PM 3 including helping companies with strategic planning and helping
05:16:05PM 4 them improve their procedures and controls.

05:16:08PM 5 MR. DANE: Your Honor, I would like to proffer Mr.
05:16:10PM 6 Tucker to the Court as an expert in the areas of accounting and
05:16:15PM 7 economic damages.

05:16:15PM 8 THE COURT: Any objection?

05:16:17PM 9 MR. BUTERMAN: No objection, Your Honor.

05:16:18PM 10 THE COURT: All right, he's accepted as an expert in
05:16:20PM 11 those areas.

05:16:22PM 12 Q Mr. Tucker, did you prepare some charts to help you,
05:16:25PM 13 assist you in explaining your testimony today to the jury?

05:16:28PM 14 A Yes.

05:16:30PM 15 Q So I've pulled up the first chart which is entitled Steves
05:16:35PM 16 Damages, and can you explain what these two categories here
05:16:39PM 17 that are reflected in this slide?

05:16:41PM 18 A These are two categories of damages that I studied. I
05:16:45PM 19 briefly mentioned them earlier, but the first relates to
05:16:49PM 20 Jeld-Wen's pricing of door skins that it supplied to Steves
05:16:52PM 21 under the terms of the 2012 supply agreement, and the second is
05:16:56PM 22 increased costs that Steves incurred related to defective door
05:17:02PM 23 skins and what I understand there was testimony about
05:17:04PM 24 inadequate packaging of the Jeld-Wen door skins and damage that
05:17:09PM 25 occurred at the Steves' plants.

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Q Now, do you understand, sir, that Steves, in this case, has asserted claims both under the law of breach of contract and under the law of antitrust?

A That's my understanding.

Q In connection with your analysis, are you expressing any opinion as to which of those categories of claims your calculations fall under?

A No. I've tried to identify the financial harm to Steves, and I understand that decision will be made by the jury or the Court.

Q In general, can you explain to the jury how you went about analyzing and determining Steves' damages?

A Sure. There's two different sets of records here. The first one involves Jeld-Wen's key input costs, and so a lot of the analysis in the first one was based on very detailed records from Jeld-Wen about how much they purchased for their inputs like wood and other -- the energy and so on.

So that study involved a very detailed look at information provided by Jeld-Wen down to the invoice level, how much did they spend in each year for each of the inputs so I could compare them, from year to year, to determine how their costs had changed.

The quality was related to Steves' records, because it was Steves that then incurred increased costs as a result of the quality issues that they complained of, and so there I studied

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05:18:34PM 1 Steves' records. During the work, as they were identifying
05:18:37PM 2 defects, they maintain what we call databases of information
05:18:40PM 3 where they would identify, here's a defect and here's who we
05:18:45PM 4 think is responsible for it. If they thought Jeld-Wen was
05:18:47PM 5 responsible, they would mark it as such or identify a category,
05:18:51PM 6 and if they thought it was Steves, then it would be recorded
05:18:54PM 7 separately.

05:18:55PM 8 Q Were you in court, sir, when Ms. Zwisler and Mr. Pomerantz
05:19:01PM 9 gave their opening statements?

05:19:02PM 10 A Yes.

05:19:03PM 11 Q And do you understand from those statements that there's a
05:19:06PM 12 dispute between the parties as to how certain terms of the
05:19:09PM 13 supply agreement should be interpreted and applied?

05:19:12PM 14 A Yes, I understand there's a dispute.

05:19:14PM 15 Q For example, you understand there's a dispute as to
05:19:17PM 16 whether the prices in the contract from year to year can go
05:19:21PM 17 down as well as up?

05:19:22PM 18 A Yes, I understand.

05:19:24PM 19 Q And a dispute as to whether the Madison and Monroe door
05:19:28PM 20 skin products that were introduced after the contract was
05:19:30PM 21 entered into, as to whether those are covered by the price
05:19:33PM 22 lists in the contract?

05:19:34PM 23 A That's another dispute I understand between the parties.

05:19:37PM 24 Q And just to be clear, are you offering any opinion, sir,
05:19:40PM 25 as to which side has the better of those arguments?

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05:19:43PM 1 A No. That would be a legal issue which is not within my
05:19:46PM 2 area of expertise or testimony.

05:19:48PM 3 Q How did you handle those disputes for purposes of doing
05:19:51PM 4 your damages calculation?

05:19:53PM 5 A What we do as experts is we're given assumptions by our
05:19:57PM 6 counsel or the client as to their interpretation of the
05:20:00PM 7 agreement, and then I rely on those assumptions and then
05:20:04PM 8 perform the analysis based on those assumptions.

05:20:07PM 9 Q Let's begin diving in a little bit of detail into the
05:20:11PM 10 specifics of your opinion, Mr. Tucker, and let's start out with
05:20:14PM 11 the overcharge issues. So here in slide two, this is a
05:20:19PM 12 discussion of the overcharge analysis that you did. Can you
05:20:23PM 13 explain what is reflected here?

05:20:25PM 14 A I've identified two sort of categories of issues involved
05:20:30PM 15 in the overcharge damage calculation. The first is, in looking
05:20:36PM 16 at the underlying Jeld-Wen records, along with my team, I
05:20:40PM 17 determined that Jeld-Wen made a number of errors when they
05:20:43PM 18 calculated their key input costs, and, therefore, I came up
05:20:47PM 19 with different numbers when I compared the key input costs from
05:20:50PM 20 year to year to see whether they increased or decreased.

05:20:53PM 21 The second is what I refer to as assumptions, and these
05:20:57PM 22 were two primary assumptions that I was asked to make. The
05:21:00PM 23 first is that if Jeld-Wen's key input costs decrease, then
05:21:05PM 24 they're required to reduce the prices under the supply
05:21:08PM 25 agreement. And the second is that the Madison and Monroe doors

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05:21:12PM 1 are covered by the portions of the supply agreement that deal
05:21:16PM 2 with similar designs or styles.

05:21:19PM 3 Q And just here, again, to be clear so the jury understands,
05:21:25PM 4 so the items under number two on this slide, those are the
05:21:29PM 5 assumptions that you were asked to make for purposes of your
05:21:32PM 6 opinion, and you understand those relates to legal issues that
05:21:36PM 7 will be determined by others; is that correct?

05:21:38PM 8 A Correct.

05:21:38PM 9 Q But the first issue, the errors and how Jeld-Wen actually
05:21:42PM 10 calculated their key input costs, is that based on any legal
05:21:46PM 11 assumptions?

05:21:46PM 12 A No. That's based on my detailed analysis of Jeld-Wen's
05:21:50PM 13 records, my understanding, and also based on my experience
05:21:55PM 14 analyzing costs, such things as key inputs.

05:22:00PM 15 Q And are you aware, Mr. Tucker, that Jeld-Wen has retained
05:22:05PM 16 its own expert on damages issues?

05:22:06PM 17 A Yes, Mr. Kaplan.

05:22:08PM 18 Q And did Mr. Kaplan challenge your calculation of the
05:22:13PM 19 errors with regard to the proper calculation of key input costs
05:22:17PM 20 based on the Jeld-Wen data?

05:22:18PM 21 A I would say generally not. He didn't perform a detailed
05:22:22PM 22 analysis of the costs at all. What he did is he relied on my
05:22:27PM 23 analysis and my model, but then he applied different
05:22:30PM 24 assumptions that were given to him by Jeld-Wen's counsel.

05:22:33PM 25 Q Turning to the next slide, and the jury has seen this

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05:22:39PM 1 document quite a bit so far, this is Schedule 2 of the Jeld-Wen
05:22:44PM 2 supply agreement, and I wanted to ask you, did you use this
05:22:49PM 3 schedule for the analysis you did of the price overcharge
05:22:54PM 4 issue?

05:22:54PM 5 A Yes. This was the document which was the guide for
05:22:59PM 6 determining how to deal with changes in key input costs and the
05:23:03PM 7 impact that it would have on price which I then used in my
05:23:07PM 8 analysis. So if you look -- I understand you've seen this
05:23:10PM 9 schedule before, but what I did is, if you look at the key
05:23:14PM 10 inputs on the left, like raw material, it has wood, and then it
05:23:18PM 11 has resin, wax, oil and sealer, and some other categories and
05:23:23PM 12 then also energy, when I said earlier that I did a detailed
05:23:26PM 13 analysis of the records, it was for all of these categories to
05:23:29PM 14 determine what the costs were in each year.

05:23:31PM 15 And then what this schedule calls for is that you compare
05:23:35PM 16 years to see if it increased or decreased, and then there's
05:23:39PM 17 what we call weightings. It's how much should the change in
05:23:43PM 18 wood be weighted, is it more important than the change in
05:23:46PM 19 natural gas. That allows you to come with one overall average
05:23:49PM 20 about how the costs change per year.

05:23:51PM 21 So I followed this formula, determined for each year what
05:23:55PM 22 the cost change was, and then I determined the price change
05:23:59PM 23 based on this Schedule 2 which says it would be 50 percent or
05:24:02PM 24 one half of the cost change.

05:24:05PM 25 Q Where did you get the information or the data that enabled

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05:24:09PM 1 you to perform your analysis of what should be the appropriate
05:24:12PM 2 cost changes under Schedule 2?

05:24:15PM 3 A Since it was based on Jeld-Wen's key input costs, it was
05:24:21PM 4 based on the information that Jeld-Wen provided about its
05:24:25PM 5 costs, its accounting records, its lists of invoices, and so
05:24:29PM 6 on. So it was information provided by Jeld-Wen in the
05:24:32PM 7 litigation.

05:24:33PM 8 Q And did you understand whether Jeld-Wen had provided that
05:24:37PM 9 type of information to Steves prior to the litigation?

05:24:41PM 10 A This was not information that was provided before.

05:24:44PM 11 Q Let's look at the next chart, and this is headed Jeld-Wen
05:24:49PM 12 Key Input Cost Changes, and there's a column titled Tucker cost
05:24:54PM 13 calculations. Can you explain to the jury what's reflected
05:24:57PM 14 here.

05:24:58PM 15 A Yes. After doing the detailed analysis of Jeld-Wen's
05:25:01PM 16 records for each of the key inputs, coming up with a weighted
05:25:05PM 17 average cost, and then comparing them between years, I
05:25:08PM 18 determined that for the purposes of each year, what the records
05:25:13PM 19 showed, how much the cost had increased or decreased. And what
05:25:17PM 20 I found is that in each of the five years, the costs had
05:25:21PM 21 decreased, although to varying degrees.

05:25:23PM 22 So, for example, in 2014, I determined that Jeld-Wen's
05:25:28PM 23 cost of key inputs decreased by 5.36 percent. And if you look
05:25:33PM 24 on a cumulative basis, I determined, along with my team, that
05:25:38PM 25 the Jeld-Wen key input costs decreased by a cumulative amount

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05:25:42PM 1 of more than 15 percent.

05:25:44PM 2 Q And that 15.28 percent, is that simply adding together all
05:25:49PM 3 the numbers that appear for each of the years?

05:25:51PM 4 A Not exactly, because they compound.

05:25:54PM 5 Q Okay. So now we see a column that's called Jeld-Wen
05:25:58PM 6 Current Position, and can you explain what this reflects?

05:26:02PM 7 A This is the position, if I could use that word, that
05:26:05PM 8 Jeld-Wen has said in this litigation is how its costs changed.
05:26:10PM 9 So it said that its costs also decreased in at least four of
05:26:16PM 10 the five years, and Jeld-Wen has said in this litigation that
05:26:20PM 11 it's cumulative -- or I calculated it, but its cumulative cost
05:26:23PM 12 increase was seven percent from the time of the signing of the
05:26:27PM 13 supply agreement to 2017.

05:26:31PM 14 If you look at the individual years, as I said, four of
05:26:34PM 15 the years show a decrease. Jeld-Wen believes they had --
05:26:39PM 16 states that they had an increase in 2015.

05:26:42PM 17 Q So it's your understanding, sir, that Jeld-Wen's current
05:26:46PM 18 position is that they acknowledge that there were cost declines
05:26:50PM 19 for four out of the five years, from 2013 through 2017, for
05:26:53PM 20 these key inputs?

05:26:54PM 21 A Yes. They've also taken the position that there were cost
05:26:58PM 22 decreases.

05:26:58PM 23 Q And just so we have it in the record, I realize it's right
05:27:02PM 24 in front of the jury, but to put it into the record, the
05:27:06PM 25 cumulative cost decrease that is Jeld-Wen's position is

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05:27:09PM 1 7.01 percent; is that correct?

05:27:12PM 2 A Cost decrease, yes.

05:27:13PM 3 Q And you calculated 15.28 percent?

05:27:21PM 4 A Cost decrease.

05:27:22PM 5 Q And so in the year that Jeld-Wen claims that costs
05:27:34PM 6 increased, what did you -- let me ask you instead, Mr. Tucker,
05:27:45PM 7 looking at some of these figures, so for the 2013 year, you
05:27:48PM 8 have the same cost reduction as -- under the Jeld-Wen column,
05:27:53PM 9 negative .30 percent. Does that indicate that you have no
05:27:56PM 10 difference of opinion with Jeld-Wen as to what happened with
05:27:59PM 11 the costs in 2013?

05:28:01PM 12 A Not exactly. I did use the same number that Jeld-Wen has
05:28:05PM 13 for 2013. That's based on what Jeld-Wen told Steves at the
05:28:11PM 14 time, but neither back then or now did they provide enough
05:28:14PM 15 information for me to be able to calculate to see whether it
05:28:17PM 16 was accurate or not. So for the purpose of my analysis, just
05:28:20PM 17 for that year, I went ahead and accepted their .3 percent
05:28:25PM 18 decrease.

05:28:26PM 19 Q Now, in these columns, there is a fairly significant
05:28:32PM 20 difference in the 2014 number between your negative
05:28:36PM 21 5.36 percent and the Jeld-Wen negative .46 percent. Can you
05:28:41PM 22 explain the reason for the difference in your calculation from
05:28:45PM 23 the Jeld-Wen position?

05:28:45PM 24 A Yes, there are a number of reasons why we differ so
05:28:48PM 25 significantly. First, as I mentioned, the .46 percent was what

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05:28:53PM 1 they provided to Steves or told Steves at the time, but they've
05:28:58PM 2 not been able to provide support then or in the litigation as
05:29:01PM 3 to how that was calculated.

05:29:04PM 4 The 5.36 percent is based on the records that they did
05:29:07PM 5 provide, their actual accounting records I, went through and
05:29:12PM 6 determined what their actual costs were and how much it
05:29:14PM 7 decreased. So that was one major difference.

05:29:17PM 8 Another difference was that in calculating the cost in
05:29:22PM 9 2014, they elected not to include two of their plants, the
05:29:26PM 10 Towanda plant in Pennsylvania and the Dodson plant in
05:29:31PM 11 Louisiana. So I believe that at least in their thinking about
05:29:35PM 12 this year, this calculation, they did not believe that certain
05:29:39PM 13 costs -- plants should be in there, and, in my mind, that
05:29:42PM 14 leaves us with just a subset of their costs. And I believed it
05:29:46PM 15 was more appropriate to look at all of their costs for all of
05:29:49PM 16 their plants that make door skins to make the comparison.

05:29:53PM 17 There were also some other issues in one case related to
05:29:57PM 18 what we call wood chipping where they added costs on to have to
05:30:03PM 19 chip the wood. They just made a calculation error and
05:30:05PM 20 overstated the amount of the wood-chipping costs. I'm not
05:30:08PM 21 disagreeing that there shouldn't be an adder. I just think the
05:30:12PM 22 percentage was too high. They made a calculation error.

05:30:15PM 23 And then late in the litigation, they changed one of their
05:30:19PM 24 conversion factors when they took green wood and made it bone
05:30:25PM 25 dry wood to figure out what the tonnage of wood is, and they

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05:30:29PM 1 had been using one factor, and then they changed it. It had a
05:30:33PM 2 significant difference, and I haven't really been able to see
05:30:36PM 3 an explanation of why it changed, why the conversion factor
05:30:40PM 4 changed.

05:30:41PM 5 So what I've done later is I've shown the analysis, both
05:30:44PM 6 with the conversion factor that they had previously used and
05:30:46PM 7 then the conversion factor that I'm not sure -- I don't
05:30:50PM 8 understand why they changed. There's some other, I would say
05:30:57PM 9 more minor issues with respect to the calculation.

05:31:01PM 10 THE COURT: Is green wood wood that has moisture in
05:31:04PM 11 it, and bone dry wood is that which has been dried out?

05:31:08PM 12 THE WITNESS: That's my understanding, sir.

05:31:12PM 13 Q Now, looking again at the 2014 number under the Jeld-Wen
05:31:16PM 14 current position, the negative .46 percent, do you see that,
05:31:19PM 15 Mr. Tucker?

05:31:19PM 16 A Yes.

05:31:20PM 17 Q And do you understand whether this was a cost reduction
05:31:25PM 18 that Jeld-Wen communicated to Steves around the time of
05:31:32PM 19 informing Steves of what the price reductions were for the 2014
05:31:37PM 20 prices?

05:31:37PM 21 A Yes, this is the amount that they told Steves at the time
05:31:40PM 22 was how their costs had decreased.

05:31:43PM 23 Q Is that also true for the 2015 figure of the plus
05:31:46PM 24 2.85 percent?

05:31:48PM 25 A No. That number has changed a number of times, and that

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05:31:52PM 1 number was not communicated to Steves at the time. Different
05:31:56PM 2 numbers were communicated at the time.

05:31:58PM 3 Q So let's take a look now at the next slide which indicates
05:32:08PM 4 what happened to prices over these years that you've been
05:32:12PM 5 discussing. Can you walk through what's reflected in this
05:32:16PM 6 chart?

05:32:16PM 7 A Yes, so the prior chart was talking about cost changes,
05:32:20PM 8 and this is now talking about price changes. What I've done is
05:32:24PM 9 I've set up three columns, but -- there's going to be a lot of
05:32:28PM 10 numbers, so I showed the left column first. This is in each
05:32:32PM 11 year what Steves -- excuse me, Jeld-Wen told Steves that the
05:32:37PM 12 price change would be. So in 2013, the costs, they said, had
05:32:41PM 13 changed by .3. One half of that is .15, and so Jeld-Wen
05:32:47PM 14 changed the prices by .15 percent.

05:32:50PM 15 In 2014, they had communicated the cost decrease and also
05:32:55PM 16 told Steves that the prices change would be .23 percent.

05:33:01PM 17 2015 gets a little more complicated. They first told
05:33:05PM 18 Steves that it would change by 1.26 percent. Then they sent
05:33:09PM 19 another letter saying it would be 1.71 percent, and then they
05:33:13PM 20 sent a third letter saying it would be 1.85 percent, and these
05:33:17PM 21 were increases as opposed to decreases.

05:33:22PM 22 And then in 2016 and 2017, nothing was provided by
05:33:26PM 23 Jeld-Wen to Steves.

05:33:29PM 24 Q The next column here, referring to the price changes, is
05:33:33PM 25 entitled What Jeld-Wen Did, and how does that differ from the

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1 previous column that you just went through concerning what
2 Jeld-Wen told Steves?

3 A The first one was their communication about what the price
4 change should be, and this one is how they actually changed the
5 prices. So in 2013, they changed the price by 1.15 percent
6 which was the same as what they had told Steves it would be.

7 In 2014, they did not make the price reduction that they
8 had communicated to Steves, and so I indicated that by saying
9 kept the 2013 prices.

10 Then in 2015, they made a number of changes, but
11 ultimately they ended up with an increase of 1.26 percent, and
12 then in 2016 and 2017, they made no changes. So the higher
13 2015 prices continued in 2016 and 2017.

14 Q Just to go back for a second to those 2016 and 2017 years,
15 these years when they kept the prices at the 2015 levels, these
16 are years when Jeld-Wen, itself, acknowledges that the key
17 input costs declined by over four percent per year; is that
18 correct?

19 A That's correct.

20 Q And this last column is titled Corrected Price Changes.
21 Can you explain what that refers to?

22 A These are the price changes that I believe are appropriate
23 based on the cost analysis and then applying the provision from
24 Schedule 2 that the price would change by 50 percent of the
25 cost change. So each of these numbers is 50 percent of the

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05:35:13PM 1 cost change I showed on the earlier chart.

05:35:16PM 2 And so I show, again, accepting their price change
05:35:20PM 3 reduction in 2013, a .15 percent, but I show the price
05:35:25PM 4 reductions that I believe would be appropriate in each of the
05:35:28PM 5 successive years such as 2.68 percent for 2014 on down to
05:35:34PM 6 2.32 percent for 2017.

05:35:38PM 7 Q I want to go back just for a second, Mr. Tucker, just to
05:35:42PM 8 ask you about one other item. So this 2015 figure with the
05:35:48PM 9 plus 2.85 percent that you understand to be Jeld-Wen's current
05:35:52PM 10 position as to what happened to the prices in that year, now,
05:35:59PM 11 do you understand that the equivalent price change under the
05:36:03PM 12 contract would be 50 percent of that or 1.42 or 1.43 percent?

05:36:08PM 13 A That's what it would be under Jeld-Wen's current position.

05:36:11PM 14 Q Now, if we look here at what Jeld-Wen told Steves in 2015,
05:36:16PM 15 there is no 1.43 percent figure; correct?

05:36:20PM 16 A That's correct.

05:36:21PM 17 Q So where did that 1.42 or .43 percent price change or the
05:36:29PM 18 2.85 percent cost change, where did that come from?

05:36:32PM 19 A Well, during this litigation, Jeld-Wen had to provide an
05:36:37PM 20 update or what they believed to be their cost change, and so
05:36:42PM 21 the numbers changed during the litigation.

05:36:47PM 22 MR. DANE: Phil, can we pull up PTX-842.

05:36:55PM 23 Q And do you understand this, Mr. Tucker, to be a document
05:37:01PM 24 that Jeld-Wen provided in the course of this litigation
05:37:06PM 25 providing information to Steves?

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05:37:07PM 1 A Yes, this is one of their responses.

05:37:09PM 2 Q And, for the record, this is defendant Jeld-Wen, Inc.'s
05:37:12PM 3 objections and responses to plaintiffs Steves and Sons, Inc.'s
05:37:17PM 4 seventh set of interrogatories and second set of request for
05:37:19PM 5 admissions.

05:37:19PM 6 MR. DANE: And, Phil, if we could turn to page four.
05:37:24PM 7 And if we can try to make that a little bigger at the bottom,
05:37:28PM 8 that would be great.

05:37:29PM 9 Q Is this where that 2.85 percent cost increase that we saw
05:37:36PM 10 for 2015 comes from?

05:37:38PM 11 A Yes. This is the support for my number on the chart you
05:37:41PM 12 showed.

05:37:42PM 13 MR. DANE: And, Phil, if we can turn to page 11 of
05:37:44PM 14 this document.

05:37:49PM 15 Q And do you see here, sir, the date of this interrogatory
05:37:53PM 16 response is August 4th, 2017; correct?

05:37:56PM 17 A Yes.

05:37:57PM 18 Q And so that was after this lawsuit was filed?

05:38:00PM 19 A Yes.

05:38:01PM 20 Q So this information that Jeld-Wen is now representing
05:38:07PM 21 represents their correct change in costs for 2015 prices is not
05:38:15PM 22 information that Jeld-Wen ever provided to Steves at the time
05:38:19PM 23 they were setting those 2015 prices; is that correct, sir?

05:38:22PM 24 A That's correct. This is a different number that was
05:38:25PM 25 provided in the litigation.

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05:38:26PM 1 Q And so if we go back --

05:38:30PM 2 MR. DANE: Thanks. You can take that down, Phil.

05:38:33PM 3 Q So here we see what Jeld-Wen told Steves. These three
05:38:39PM 4 cost increases, do you understand these were all cost increases
05:38:44PM 5 that Jeld-Wen did communicate to Steves as what the 2015 prices
05:38:50PM 6 should have been during that year?

05:38:51PM 7 A At the time, this is what they communicated.

05:38:54PM 8 Q And we just looked at that pleading that had another cost
05:39:00PM 9 increase position that Jeld-Wen took in this lawsuit; correct?

05:39:06PM 10 A Yes.

05:39:07PM 11 Q Was there another pleading that Jeld-Wen provided in this
05:39:13PM 12 lawsuit prior to the one we just looked at in which Jeld-Wen
05:39:17PM 13 also indicated what it thought its correct cost increase was
05:39:22PM 14 for 2015?

05:39:23PM 15 A There was one before the 1.43 one that had a different
05:39:30PM 16 number before that that got adjusted to the 1.43.

05:39:35PM 17 Q So the reason you have this 2.85 percent, is that because
05:39:39PM 18 the most recent thing we've heard from Jeld-Wen is what they
05:39:42PM 19 said in that August 2017 pleading?

05:39:44PM 20 A Yes, that's what I wanted to rely on.

05:39:47PM 21 Q So the jury knows, how many iterations have you seen from
05:39:51PM 22 Jeld-Wen as to what they claim is the correct change in prices
05:39:54PM 23 for 2015?

05:39:56PM 24 THE COURT: You are flipping back and forth between
05:39:59PM 25 prices and costs, and the chart you are talking about is cost.

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05:40:05PM 1 And you can't go back and forth between the two.

05:40:10PM 2 MR. DANE: I'm sorry, Your Honor.

05:40:12PM 3 THE COURT: It's confusing. Ask it in a parallel
05:40:15PM 4 way, and if they're saying two or three things about the price,
05:40:19PM 5 deal with that in one set of questions. If they're saying two
05:40:22PM 6 or three things about the cost, deal with that in another set
05:40:25PM 7 of questions.

05:40:26PM 8 Q How many different iterations have you seen, Mr. Tucker,
05:40:30PM 9 that Jeld-Wen has taken with regard to what the appropriate
05:40:35PM 10 change in their costs for the key inputs were for 2015?

05:40:39PM 11 A This is the fifth one for 2015.

05:40:46PM 12 Q Now, you testified as to the reasons that you came up with
05:40:50PM 13 a difference in your own calculation of what the appropriate
05:40:53PM 14 reduction was in Jeld-Wen's costs for 2014. Were those the
05:41:00PM 15 same reasons that explain the difference between your different
05:41:04PM 16 cost reduction calculations for 2015 compared to the
05:41:08PM 17 2.85 percent cost increase that Jeld-Wen has indicated is their
05:41:15PM 18 position as to what is the proper cost change?

05:41:17PM 19 A 2015, the difference is related to many of the same issues
05:41:22PM 20 but not all of them. The issue of leaving out some of the
05:41:25PM 21 plants is not as significant in 2015 as it is in 2014, but the
05:41:30PM 22 same types of calculation errors occurred in 2015.

05:41:36PM 23 Q And with regard to the cost declines that Jeld-Wen has
05:41:46PM 24 indicated it believes it incurred for the key inputs for 2016
05:41:51PM 25 and 2017, were those cost decreases that Jeld-Wen communicated

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05:41:57PM 1 to Steves for those years?

05:41:59PM 2 A No. There was no communication about cost decreases in
05:42:04PM 3 2016 or 2017 from Jeld-Wen to Steves.

05:42:07PM 4 Q Just to finish with this chart, and so for the years 2013
05:42:27PM 5 through 2017 -- let me focus on beginning in 2015. For the
05:42:35PM 6 year that shows the 2.85 percent cost increase, did Jeld-Wen
05:42:41PM 7 increase its prices to Steves for that year?

05:42:44PM 8 A In 2015, Jeld-Wen increased the prices of its door skins.

05:42:48PM 9 Q And for the years 2016 and 2017 when Jeld-Wen is reporting
05:42:54PM 10 that it had reductions in its input costs, did it decrease its
05:43:00PM 11 prices to Steves?

05:43:01PM 12 A It did not.

05:43:14PM 13 Q The next chart, Mr. Tucker, you mentioned at the beginning
05:43:18PM 14 that one of the assumptions that you have made in calculating
05:43:22PM 15 your overcharge damage assessment is that when costs decline,
05:43:28PM 16 the prices should also have declined under the contract; is
05:43:31PM 17 that right?

05:43:31PM 18 A Yes.

05:43:33PM 19 Q And did you prepare this chart to show what the effect was
05:43:36PM 20 of that assumption?

05:43:39PM 21 A Yes. This shows the difference between making an
05:43:43PM 22 assumption that the costs -- the price does not change if the
05:43:47PM 23 costs decrease compared to if the price changes if the costs go
05:43:53PM 24 down or up. Excuse me, the price changes. So on the left side
05:43:59PM 25 what I've shown is under Jeld-Wen price changes, they showed

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05:44:03PM 1 price decreases in four years, but I understand their position
05:44:07PM 2 is that there should be no price change when the costs go down.
05:44:11PM 3 And, therefore, they would say there's only a price increase in
05:44:16PM 4 2015 when the prices went up.

05:44:20PM 5 Based on the assumption that I relied on that prices would
05:44:23PM 6 go down if there's cost decreases, then taking the proper price
05:44:29PM 7 change for each of the years, the price should go down by the
05:44:33PM 8 amounts in each of the years in a cumulative amount of
05:44:39PM 9 7.87 percent, or almost eight percent, and that's about half --
05:44:42PM 10 it is half of what I found to be the cost decreases in
05:44:45PM 11 Jeld-Wen's key inputs.

05:44:46PM 12 Q And do you understand that based upon the information that
05:44:50PM 13 it's provided in this litigation, that for the overall
05:44:54PM 14 cumulative period of 2013 through 2017, Jeld-Wen agrees that
05:45:00PM 15 its input costs overall declined during that period?

05:45:04PM 16 A Yes. That's what we showed on the prior schedule about
05:45:07PM 17 seven percent.

05:45:08PM 18 Q Yet, despite that decline, Jeld-Wen, as I understand it,
05:45:14PM 19 has taken the position that under the contract, they are
05:45:17PM 20 entitled to increase their costs by 1.43 percent.

05:45:21PM 21 A That's my understanding.

05:45:21PM 22 MR. BUTERMAN: Objection, Your Honor. That misstates
05:45:27PM 23 Jeld-Wen's position throughout this litigation.

05:45:34PM 24 MR. DANE: I don't believe it does, Your Honor.

05:45:36PM 25 They've taken the position that the prices only go down -- only

05:45:41PM 1 go up or stay flat and don't go down.

05:45:44PM 2 MR. BUTERMAN: Your Honor, maybe we can approach and
05:45:46PM 3 discuss this for a second.

05:45:48PM 4 THE COURT: All right.

05:45:55PM 5
05:45:55PM 6 (Discussion at sidebar as follows:)

05:45:58PM 7
05:45:58PM 8 MR. BUTERMAN: Your Honor, the point is very much
05:46:02PM 9 misleading. Jeld-Wen has never taken the position that it
05:46:05PM 10 cannot give a price decrease under the contract. It,
05:46:08PM 11 obviously, did give a price decrease under the contract --

05:46:11PM 12 THE COURT: No, that wasn't the question. The
05:46:13PM 13 question was, do you understand your position is that the
05:46:18PM 14 contract doesn't provide for any decreases, and that is your
05:46:22PM 15 position. It's been your position.

05:46:25PM 16 MR. BUTERMAN: That we're not obligated to provide
05:46:27PM 17 any decrease.

05:46:28PM 18 THE COURT: He asked the question the right way. It
05:46:30PM 19 wasn't wrong. Overruled.

05:46:32PM 20 MR. BUTERMAN: Thank you, Your Honor.

05:46:32PM 21
05:46:32PM 22 (End of sidebar discussion.)

05:46:35PM 23
05:46:42PM 24 THE COURT: What's the -- I'm sort of confused in
05:46:46PM 25 slide four. You said the cumulative decrease was

05:46:48PM 1 15.28 percent, and slide nine you say -- these are price --

05:46:55PM 2 MR. DANE: Yes, Your Honor, it's 50 percent.

05:46:57PM 3 THE WITNESS: It's exactly half of the cost changes.

05:47:00PM 4 THE COURT: I misread the thing. Sorry.

05:47:02PM 5 MR. DANE: I apologize, Your Honor. I had them
05:47:04PM 6 bouncing around between price and cost.

05:47:07PM 7 THE COURT: Excuse me. At this juncture, we have
05:47:09PM 8 some jurors who need to move their cars or else they'll be here
05:47:12PM 9 for the night, and I think probably they don't need to be here
05:47:15PM 10 for the night. So we'll adjourn for the evening, resume at
05:47:21PM 11 9:30 in the morning, and thank you very much for your
05:47:24PM 12 attention. Please remember my previous admonitions about
05:47:26PM 13 discussing the case and doing any research. Thank you so much
05:47:30PM 14 for your careful attention.

05:47:49PM 15
05:47:49PM 16 (Jury out.)

05:48:01PM 17
05:48:01PM 18 THE COURT: All right, Dr. Tucker, you can step down,
05:48:06PM 19 and don't discuss your testimony with anybody but the lawyers
05:48:09PM 20 in the case.

05:48:10PM 21 THE WITNESS: Thank you.

05:48:13PM 22 THE COURT: Anybody have anything else you want to
05:48:16PM 23 say on the issue of lost profits given the testimony that Mr.
05:48:25PM 24 Steves gave and the cross-examination -- on direct and the
05:48:31PM 25 cross-examination? Anybody have any questions?

05:48:35PM 1 MS. ZWISLER: Well, Your Honor, the only thing I
05:48:37PM 2 would say for Jeld-Wen is --

05:48:40PM 3 THE COURT: You better come up to the lectern.

05:48:44PM 4 MS. ZWISLER: I won't belabor the point. I think
05:48:50PM 5 that under the legal test of reasonable certainty, Mr. Sam
05:48:54PM 6 Steves' testimony and the other evidence that you've heard over
05:48:57PM 7 the last few days do not establish as a matter of law that the
05:49:02PM 8 recovery of lost profits is reasonably certain.

05:49:06PM 9 He has no idea what's going to happen. He thinks
05:49:09PM 10 it's likely, it might change, might not. That's not sufficient
05:49:13PM 11 under the law.

05:49:14PM 12 THE COURT: Couldn't those questions be presented in
05:49:17PM 13 any future lost profits case the way you are arguing?

05:49:20PM 14 MS. ZWISLER: No, not actually, because to me, the
05:49:26PM 15 way it normally works -- this is not a ripeness issue. It's a
05:49:30PM 16 speculation issue. If the injury has been suffered, then the
05:49:34PM 17 question is whether the measurement in the future is
05:49:40PM 18 reasonable, and that has to do with the reasonable certainty.

05:49:44PM 19 Here, we're not talking about measurement in the
05:49:47PM 20 slightest. We're talking about is there a factual predicate,
05:49:50PM 21 and I think you've got the exact right predicate for this,
05:49:55PM 22 which, is do they have a factual predicate that permits them to
05:49:59PM 23 essentially opine that it's reasonably certain that they're
05:50:02PM 24 going to go out of business, and our position is they don't.
05:50:06PM 25 Thank you, Your Honor.

05:50:07PM 1 THE COURT: All right.

05:50:09PM 2 MR. DANE: Do you want to hear further --

05:50:11PM 3 THE COURT: Anything you want to say.

05:50:18PM 4 MR. DANE: Your Honor, just very briefly, I agree
05:50:21PM 5 with Your Honor that the logic of their position would mean
05:50:24PM 6 there's never such a thing as a future lost profits case, there
05:50:28PM 7 are never any damages based on future conduct, and that's not
05:50:30PM 8 the law. And the situation with the *Arnott* case that we cited,
05:50:36PM 9 the cases involving incipient businesses, if it can reasonably
05:50:41PM 10 be concluded that it's likely certain events will occur, then
05:50:45PM 11 remedy can be provided for those future events occurring and
05:50:49PM 12 the damages --

05:50:50PM 13 THE COURT: Their argument is that they're, in
05:50:55PM 14 essence, two big sets of ifs. The first set of ifs is the four
05:51:02PM 15 contingencies, I guess we should call them. The second if is
05:51:05PM 16 if -- and let's assume for the moment that you are correct,
05:51:09PM 17 that a jury reasonably could conclude that -- to a reasonable
05:51:15PM 18 certainty that any of the ifs -- that none of the ifs would
05:51:19PM 19 occur.

05:51:19PM 20 Then there's another if, and that is, assuming they
05:51:24PM 21 don't occur, assuming the lack of supply, they will go out of
05:51:28PM 22 business, and it's that second jump that is the biggest problem
05:51:34PM 23 for you, isn't it? How do you get around that in the
05:51:41PM 24 *Vermiculite* case and the general principles applicable to lost
05:51:47PM 25 profits?

05:51:47PM 1 MR. DANE: Well, on that point, Your Honor, I think
05:51:50PM 2 that the testimony of Mr. Steves is sufficient, because it
05:51:54PM 3 establishes -- one way to simplify it, I think, Your Honor,
05:52:00PM 4 would be, say that the Steves only sold door skins -- sorry,
05:52:06PM 5 only sold interior molded doors. It's the only thing they
05:52:10PM 6 made. They can't sell interior molded doors without door
05:52:15PM 7 skins, and they can no longer get door skins. That's pretty
05:52:20PM 8 close to our case.

05:52:21PM 9 Under that scenario, the question of can you still
05:52:25PM 10 continue to run a business seems pretty self-evident. Of
05:52:31PM 11 course you can't. If your only product is not something you
05:52:37PM 12 can make because the supply of it has been taken away, you're
05:52:41PM 13 not going to be able to stay in business.

05:52:44PM 14 Their arguments have really -- they've thrown out,
05:52:48PM 15 well, maybe that wouldn't happen, but they haven't articulated
05:52:51PM 16 any reason --

05:52:52PM 17 THE COURT: What they've said is you can't be sure
05:52:55PM 18 it's not going to happen.

05:52:58PM 19 MR. DANE: Your Honor, if we don't have the source of
05:53:02PM 20 the product that we need to make interior molded doors, we
05:53:06PM 21 can't sell our product, and we can't be in business.

05:53:09PM 22 THE COURT: I understand that, but Ms. Zwisler was
05:53:12PM 23 honing in on this point, and that is that you are measuring
05:53:19PM 24 whether you're going out of business by your assessment of the
05:53:23PM 25 four preceding ifs; Jeld-Wen, Masonite not supplying, no

05:53:29PM 1 foreign supply adequate unto the day, and can't build. You are
05:53:36PM 2 measuring all that based on the status of what you know today
05:53:39PM 3 and, from that, inferring you're going out of business because
05:53:42PM 4 they're not going to occur -- because those sources of supply
05:53:48PM 5 won't be available to you. So you are assuming two ifs.
05:53:52PM 6 That's what she's saying. What do you say to that?

05:53:54PM 7 MR. DANE: There are two ifs, Your Honor, and not to
05:53:59PM 8 get too mathematical -- I know we just had a bunch more math
05:54:04PM 9 than anybody wants at 5:30, but if you imagine there are the
05:54:08PM 10 two ifs, and if the jury concludes that for each of those four
05:54:14PM 11 potential options -- say they conclude, well, based on the
05:54:18PM 12 evidence, we think that it's less than a ten percent
05:54:23PM 13 possibility that any of those would occur, so even if you
05:54:28PM 14 combine them together, they're still going to be very unlikely.
05:54:33PM 15 And then on the second part of it, which also comes into it, if
05:54:37PM 16 they say, well, there's some uncertainty that comes into play
05:54:43PM 17 about would Steves actually go out of business if they don't
05:54:46PM 18 have the source of supply.

05:54:47PM 19 Well, that's all they sell. They don't make any
05:54:50PM 20 money selling anything else. Maybe we discount the certainty
05:54:55PM 21 of their going out of business a little bit, say it's
05:54:58PM 22 90 percent instead of 100 percent. That's still going to leave
05:55:01PM 23 them with a reasonable certainty, even considering those four
05:55:05PM 24 factors on the first part and the possibility of somehow
05:55:09PM 25 continuing to remain in business even when you can no longer

05:55:12PM 1 make the only product that makes any money for you, they can
05:55:16PM 2 combine all of that and still reasonably conclude that Steves
05:55:19PM 3 would go out of business and incur lost profits. That's our
05:55:22PM 4 position.

05:55:23PM 5 THE COURT: All right. Thank you. All right. It's
05:55:27PM 6 your motion, so if there's anything else, speak up. We're
05:55:33PM 7 under Rule 50 at this juncture. Anybody else got anything?
05:55:38PM 8 Going, going -- oh.

05:55:41PM 9 MS. ZWISLER: One more thing. So if the jury guesses
05:55:45PM 10 wrong, do we get the money back? That's not a joke. I think
05:55:48PM 11 that's one real-world way to think about this.

05:55:53PM 12 THE COURT: You know how I read that can be dealt
05:55:57PM 13 with?

05:55:59PM 14 MS. ZWISLER: No, I'm afraid to ask.

05:56:02PM 15 THE COURT: It can be placed in a trust, earn
05:56:07PM 16 interest, and if, in fact, they're wrong, you get it back. I
05:56:11PM 17 read that one time. I never did figure out how it could occur,
05:56:15PM 18 but I think the answer is you can't.

05:56:17PM 19 MS. ZWISLER: One other way to think about this is
05:56:20PM 20 Jeld-Wen has the right to mitigate its damages. So if -- the
05:56:25PM 21 Steves has to mitigate its damages. Jeld-Wen -- one
05:56:29PM 22 possibility to consider, and this is not so much a jury issue
05:56:32PM 23 as it's trying to illustrate the problem we're all having here
05:56:35PM 24 which is if Jeld-Wen loses this lawsuit and the jury awards a
05:56:40PM 25 future lost profits, and assume the Fourth Circuit were to

05:56:43PM 1 affirm, then there would be an incentive for Jeld-Wen,
05:56:49PM 2 obviously, to avoid the future lost -- avoid -- to sign up
05:56:55PM 3 another long-term supply agreement.

05:56:56PM 4 So then what happens? They don't go out of business,
05:56:59PM 5 but Jeld-Wen is out one \$150 million or whatever the jury gives
05:57:03PM 6 them. That's why this is a very practical matter, this is
05:57:08PM 7 not -- it's so speculative that it can't happen, because we
05:57:11PM 8 don't know what would happen if Jeld-Wen loses --

05:57:15PM 9 THE COURT: Is there any difference between that and
05:57:16PM 10 any other lost profit award when --

05:57:22PM 11 MS. ZWISLER: You know, typically in these cases --

05:57:26PM 12 THE COURT: Do you ever get it back?

05:57:28PM 13 MS. ZWISLER: No, because typically, in the cases
05:57:30PM 14 that are in their brief, as Mr. Pfeiffer has argued, those
05:57:34PM 15 businesses are already gone. And so the issue is not what to
05:57:39PM 16 do but what is the likelihood that they would have continued as
05:57:44PM 17 a profitable business going forward.

05:57:46PM 18 That's a very different question than this one. So
05:57:49PM 19 they're dead. So then you get arguments about, well, they
05:57:52PM 20 never would have survived anyway, they didn't have the right
05:57:56PM 21 plant, they this, they that.

05:57:58PM 22 So there is two questions for that jury. One is
05:58:01PM 23 question is, would they really have ever survived anyway even
05:58:03PM 24 apart from what the defendant did, and the second question is,
05:58:06PM 25 if they did survive, what's the reasonable measure of their

05:58:09PM 1 damages. We don't have question one here. We have a very
05:58:13PM 2 different question. We have it's a going concern, they haven't
05:58:16PM 3 proved anything about their finances that said anything about
05:58:19PM 4 anything so far.

05:58:22PM 5 THE COURT: But the expert does. That's what Mr.
05:58:26PM 6 Tucker does.

05:58:27PM 7 MS. ZWISLER: He is just measuring if they're dead,
05:58:31PM 8 what's the future profitability. He's not measuring -- so he's
05:58:35PM 9 measuring it with an assumption that the business is gone.

05:58:40PM 10 So in most future lost profits, in fact all the ones
05:58:44PM 11 that I know, the business is dead. Not dead. The plaintiff
05:58:48PM 12 has failed as a business, and so the reasonable approximation
05:58:52PM 13 is based on would it have survived and to what degree would it
05:58:56PM 14 have competed, how much revenues would it have had based on its
05:59:00PM 15 startup revenues and the other elements of its business, and
05:59:05PM 16 then, if it survived, how do you run out and how far do you run
05:59:08PM 17 out the damages.

05:59:09PM 18 That is a very different case than this one. So
05:59:14PM 19 because we don't have that kind of case, it's not -- this is
05:59:18PM 20 not like every other future lost profits case. I've never seen
05:59:21PM 21 a case where the plaintiff is saying that if the events that
05:59:31PM 22 are giving rise to the problem cause it to go out of business
05:59:35PM 23 maybe, that, then, it can get future lost profits today.
05:59:40PM 24 It's -- I do think it's a case of first impression, but I think
05:59:44PM 25 we have the better argument.

05:59:45PM 1 THE COURT: It is a case of first impression. I've
05:59:48PM 2 not found anything exactly on point. All right, this comes to
05:59:56PM 3 the Court on a motion under Rule 50(a) that got here by way of
06:00:05PM 4 an undecided summary judgment motion pursuant to -- after which
06:00:10PM 5 future -- further briefing was called for, and after reading
06:00:17PM 6 that briefing, the Court determined that given the unusual
06:00:21PM 7 nature of the evidentiary issues that had to be decided, it was
06:00:25PM 8 preferable to decide the case -- the issue as a judgment -- as
06:00:32PM 9 a matter of law under 50, Rule 50(a)(1) after having heard
06:00:37PM 10 fully the plaintiff on the issue at trial.

06:00:42PM 11 Under the rule, if a party has been fully heard on an
06:00:46PM 12 issue during a jury trial and the Court finds that a reasonable
06:00:50PM 13 jury would not have a legally sufficient evidentiary basis to
06:00:54PM 14 find for the party on that issue, then the Court may resolve
06:00:58PM 15 the issue against the party and grant a motion for judgment as
06:01:03PM 16 a matter of law.

06:01:03PM 17 I have worried over this whole issue and studied it,
06:01:10PM 18 and I think it is correct, as Ms. Zwisler says, it is an issue
06:01:20PM 19 that is unique in the way it comes to the Court. I'm sorry,
06:01:50PM 20 I've lost something here. Give me a minute.

06:01:59PM 21 Considering all of the evidence, including that
06:02:05PM 22 from -- that has been presented in the plaintiff's case and Mr.
06:02:09PM 23 Sam Steves, the evidence is that if there is no supply of
06:02:19PM 24 interior molded door skins, Steves will be out of business at
06:02:25PM 25 the conclusion of the contract in 2021. The evidence at this

06:02:33PM 1 juncture is also, if Steves had a limited supply of door skins,
06:02:40PM 2 as is evident by the kind of supply that, say, Teverpan could
06:02:46PM 3 supply, Steves will be out of business, because the people with
06:02:52PM 4 whom they do business will not do business with them because
06:02:55PM 5 they don't have sufficient range of product to do that.

06:03:03PM 6 A reasonable jury could find with a reasonable
06:03:09PM 7 certainty that Jeld-Wen will not be a source of supply after
06:03:16PM 8 September 2021, that Masonite will not be a source of supply
06:03:22PM 9 after September of 2021, that foreign supply will not be a
06:03:30PM 10 source of supply, or what Steves needs are after September of
06:03:37PM 11 2001, and that Steves cannot build a door skin plant by
06:03:40PM 12 September of September 2001.

06:03:43PM 13 On that basis and the basis of the evidence at this
06:03:50PM 14 stage of the proceeding, according to plaintiff all of the
06:03:55PM 15 inferences to which it is entitled on a motion made at this
06:04:00PM 16 stage, the motion for Rule 50 relief must be denied, because a
06:04:05PM 17 jury could reach a verdict on the issue of lost profits in
06:04:10PM 18 favor of Steves.

06:04:11PM 19 So on that issue, Dr. Tucker can testify about it
06:04:19PM 20 tomorrow, and the plaintiffs -- I mean the defendants can put
06:04:24PM 21 on whatever evidence they wish to put on about it.

06:04:27PM 22 MR. POWELL: Your Honor, I may have misheard you, but
06:04:29PM 23 I think the last two times you said a date, you said 2001, and
06:04:33PM 24 I believe you meant to say --

06:04:35PM 25 THE COURT: I mean September of 2021. I don't know

06:04:38PM 1 how on earth it could have left my mind.

06:04:40PM 2 MR. POWELL: Thank you, Your Honor.

06:04:42PM 3 THE COURT: Thank you, though. Ms. Rathbun, did you
06:04:45PM 4 get the lawyer who was so anxiously awaiting something, to hear
06:04:51PM 5 from you?

06:04:51PM 6 MS. RATHBUN: Yes, Your Honor. I read the motion,
06:04:53PM 7 and I did not want to get crosswise with Kronospan's counsel,
06:04:57PM 8 so I asked Ms. Maltas to call him. She has been the point
06:05:00PM 9 person in discussions with him.

06:05:01PM 10 She spoke with Kronospan's counsel. He is available
06:05:06PM 11 tomorrow at any time to discuss telephonically during a break.
06:05:12PM 12 He can also jump on a plane and be here by tomorrow afternoon
06:05:15PM 13 or Thursday for a hearing.

06:05:19PM 14 THE COURT: Well, it depends on what you all are
06:05:22PM 15 going to do as to whether or not it's an appropriate kind of
06:05:26PM 16 thing to deal with by telephone. I guess the skimming that I
06:05:32PM 17 did of the motion is that I don't understand, other than the
06:05:38PM 18 identity of the owners of Kronospan, what it is that's being --
06:05:45PM 19 that is sought to be protected. Do you have an understanding
06:05:49PM 20 of that?

06:05:49PM 21 MS. RATHBUN: I believe it is just the owners of
06:05:51PM 22 Kronospan.

06:05:52PM 23 THE COURT: And do you need to put the names of THE
06:05:54PM 24 owners of Kronospan in the record at all?

06:05:56PM 25 MS. RATHBUN: The difficulty here, Your Honor --

06:06:00PM 1 THE COURT: Can't we just call them A and B?

06:06:03PM 2 MS. RATHBUN: I think that something might be

06:06:04PM 3 possible for the document that we would like to use.

06:06:07PM 4 Unfortunately, for the deposition testimony, it's wrapped up in

06:06:11PM 5 the question, and we'll try to think of another creative

06:06:15PM 6 solution.

06:06:16PM 7 THE COURT: How about redaction of the deposition?

06:06:18PM 8 MS. RATHBUN: We can consider that. I'll go back and

06:06:22PM 9 consider that. I think we'll keep working on it, Your Honor.

06:06:28PM 10 THE COURT: What is the import of having the owners'

06:06:33PM 11 names here? You said something about showed they were

06:06:36PM 12 interested.

06:06:37PM 13 MS. RATHBUN: To show they were interested in

06:06:40PM 14 partnering with Steves to build a molded door skin plant, Your

06:06:43PM 15 Honor.

06:06:43PM 16 THE COURT: Is it that they're so substantial, such

06:06:46PM 17 substantial people or companies or something that it makes

06:06:54PM 18 Kronospan a more viable candidate or what --

06:06:59PM 19 MS. RATHBUN: Correct, Your Honor. My understanding

06:07:00PM 20 is Kronospan is a very large company, and their ownership is

06:07:05PM 21 interested in this project, and that, we feel, gives it some

06:07:08PM 22 more weight that the jury should hear.

06:07:11PM 23 THE COURT: That wasn't quite what I was asking. If

06:07:16PM 24 Robert and Ann Payne own Kronospan, and somebody were to go

06:07:21PM 25 look -- we inherited it or something, go to check us out, they

06:07:27PM 1 would find we couldn't put too much capital into it.

06:07:31PM 2 If British Petroleum and British Air or Stella Artois
06:07:41PM 3 owned Kronospan and they're willing to back it with their own
06:07:44PM 4 resources, maybe that gives more oomph to the matter. I'm not
06:07:51PM 5 sure how relevant it is, to tell you the truth.

06:07:53PM 6 Okay, Ms. Curran-Huberty, you want to be heard, come
06:07:56PM 7 to the lectern.

06:08:01PM 8 MS. CURRAN-HUBERTY: Just one point of clarification,
06:08:03PM 9 Your Honor. My understanding regarding what Kronospan's
06:08:06PM 10 counsel seeks to seal, it's not just limited to the identity of
06:08:10PM 11 the owners of Kronospan. There are also portions of Mr. Pack's
06:08:15PM 12 deposition in this case that simply go to -- they contain
06:08:19PM 13 statements regarding Kronospan's plans regarding future
06:08:25PM 14 business ventures in the United States.

06:08:29PM 15 THE COURT: All right. Well, then we better schedule
06:08:32PM 16 a little hearing for them, and given what we're doing, this is
06:08:39PM 17 going to be put on in your case, when did you say?

06:08:43PM 18 MS. RATHBUN: Your Honor, I believe we're flexible on
06:08:46PM 19 that, so within the next couple days, but we can certainly move
06:08:50PM 20 it around a bit.

06:08:53PM 21 THE COURT: Well, do you have a definition, or do you
06:08:57PM 22 have definition of specific things that they want to keep out
06:09:01PM 23 that you can -- from the deposition or the documents?

06:09:04PM 24 MS. CURRAN-HUBERTY: Yes, Your Honor. Kronospan's
06:09:05PM 25 counsel has identified specific pages and lines.

06:09:07PM 1 THE COURT: Could you give me a copy of that so I can
06:09:10PM 2 look at it.

06:09:12PM 3 MS. CURRAN-HUBERTY: Yes, Your Honor. I also believe
06:09:13PM 4 it is in the filing that Kronospan's counsel filed today.
06:09:17PM 5 Perhaps at the very end.

06:09:19PM 6 THE COURT: Well, I don't have the exhibits. I think
06:09:22PM 7 that's the problem. I don't have the exhibits. You mean the
06:09:28PM 8 parts they want, they filed and attached to the brief or the
06:09:40PM 9 motion? Because that's troublesome for them. That's not under
06:09:49PM 10 seal. It's in the public domain.

06:09:53PM 11 MS. CURRAN-HUBERTY: I only have the briefing on my
06:09:54PM 12 phone, Your Honor. I believe it was just a list of citations
06:10:01PM 13 to the deposition, not the text of the deposition.

06:10:04PM 14 THE COURT: Oh. How about you -- since I don't keep
06:10:07PM 15 these depositions back in the office, how about you giving
06:10:11PM 16 me -- you and Ms. Rathbun give me a conformed copy to look at
06:10:16PM 17 it, and tell the lawyer that he can do -- is it he or she?

06:10:22PM 18 MS. CURRAN-HUBERTY: I believe it's a he, Your Honor.

06:10:23PM 19 THE COURT: Tell him he can do one of two things. He
06:10:26PM 20 can come up here and be here on Thursday, or he can hire local
06:10:31PM 21 counsel and have the local counsel take care of it, and we will
06:10:37PM 22 plug him in by telephone. I guess you're going to put that
06:10:41PM 23 burden on Ms. Maltas now; is that correct?

06:10:44PM 24 MS. RATHBUN: Absolutely. I'll pull together the
06:10:47PM 25 deposition.

06:10:47PM 1 THE COURT: I thought you weren't talking to him.

06:10:50PM 2 MS. RATHBUN: I don't want to get in between that.

06:10:52PM 3 MS. CURRAN-HUBERTY: We have both been speaking with
06:10:55PM 4 him over the last week.

06:10:56PM 5 THE COURT: We'll take it up on a break on Thursday
06:10:59PM 6 afternoon sometime. I guess if he filed this -- the reason I
06:11:05PM 7 say he can come up here is he's qualified in person to be a
06:11:09PM 8 lawyer, a member of the court, because he didn't have any local
06:11:12PM 9 counsel with him, but I can understand -- I mean on his papers,
06:11:16PM 10 but I can understand that he might not, and that's okay. He
06:11:20PM 11 can get somebody to kind of help him out. We'll work with him
06:11:23PM 12 to try to do it in a reasonable way, but I just need to
06:11:26PM 13 understand.

06:11:28PM 14 MS. CURRAN-HUBERTY: Yes, Your Honor. Thank you.

06:11:29PM 15 THE COURT: Are you going to wrap up tomorrow?

06:11:32PM 16 MR. POMERANTZ: Yes, Your Honor, we will finish Mr.
06:11:34PM 17 Tucker and the rest.

06:11:36PM 18 THE COURT: When will you rest?

06:11:38PM 19 MR. POMERANTZ: It will be in the morning.

06:11:40PM 20 THE COURT: Will you be ready to go in the afternoon?

06:11:42PM 21 MS. ZWISLER: We are, Your Honor. We have a witness
06:11:45PM 22 here. We have more than one ready to go, roll -- they're all
06:11:49PM 23 live.

06:11:50PM 24 THE COURT: You told me you wanted to make some
06:11:52PM 25 Rule 50 motions on everything else.

06:11:54PM 1 MS. ZWISLER: Yes.

06:11:55PM 2 THE COURT: I'll hear you after we hear the
06:11:58PM 3 testimony.

06:11:59PM 4 MS. ZWISLER: Thank you, Your Honor. We'll make it
06:12:01PM 5 orally, say to Your Honor we have a motion we'll reserve until
06:12:06PM 6 later today.

06:12:07PM 7 THE COURT: That's fine. They changed the rule. You
06:12:10PM 8 don't have to make it at the close of all the evidence. You
06:12:13PM 9 can make it at any time before it goes to the jury. The old
06:12:17PM 10 rule preserving the rights were -- was changed, so you don't
06:12:24PM 11 have to make it to preserve it like you do still in the
06:12:27PM 12 criminal way.

06:12:29PM 13 But in any event, that's how you were able to make
06:12:31PM 14 the one that you made today, after they had been heard. Any
06:12:36PM 15 time before the jury retired, you can make those motions.
06:12:41PM 16 Procedurally your position will be preserved.

06:12:44PM 17 MS. ZWISLER: Thank you, Your Honor. Tomorrow.

06:12:45PM 18 MR. POMERANTZ: Your Honor, can I ask one question.
06:12:48PM 19 I just want to know when you wanted to get together to discuss
06:12:51PM 20 jury instructions given the schedule for the rest of the week
06:12:55PM 21 so we can slide into our availability schedule.

06:13:00PM 22 THE COURT: I don't know yet. I'm studying the jury
06:13:03PM 23 instructions. I still think they're too convoluted. They
06:13:12PM 24 are -- we have simplified them considerably, and some of the
06:13:20PM 25 problems have been eliminated, but it's -- there's a lot of --

06:13:30PM 1 there are a lot of things in the pattern instructions that just
06:13:33PM 2 don't apply here, and they need to be out, because if you give
06:13:37PM 3 the jury instructions on things that there's no evidence on, it
06:13:42PM 4 sort of makes it hard for them to do their job. And then you
06:13:46PM 5 get a bunch of questions, and then you get the problem with how
06:13:50PM 6 do you answer the question. Most of the time the answer is you
06:13:54PM 7 have to do the best you can. So I'd rather take the bull by
06:13:59PM 8 the horns at the front end, but I guess you're going to rest.

06:14:06PM 9 Now, I didn't poll them about Saturday yet. You've
06:14:11PM 10 got people you can put on Saturday even though Hachigian is not
06:14:15PM 11 here on Saturday; right?

06:14:17PM 12 MS. ZWISLER: It would require the experts to go
06:14:21PM 13 before Mr. Hachigian which would be -- we just can't do that, I
06:14:24PM 14 don't think, but let me just say that even without Saturday, we
06:14:28PM 15 believe that we can close -- that we can -- our case would
06:14:33PM 16 close on Tuesday regardless. So I'm still with Mr. Pomerantz
06:14:37PM 17 --

06:14:37PM 18 THE COURT: Then they have rebuttal.

06:14:41PM 19 MS. ZWISLER: At some point on Tuesday. I still
06:14:44PM 20 think that we can close on Wednesday morning, even with a
06:14:48PM 21 rebuttal case, because it will be very short, and that
06:14:50PM 22 really -- we could do the charge conference Saturday, close
06:14:53PM 23 Wednesday morning, and the jury is going to give us a verdict
06:14:56PM 24 within that time. I realize it's an imposition on them, but I
06:15:00PM 25 think they prefer to do that than come Saturday.

06:15:05PM 1 THE COURT: You know, I agree with you. I have your

06:15:09PM 2 telephone number, don't I?

06:15:11PM 3 MS. ZWISLER: Yes, Your Honor.

06:15:12PM 4 THE COURT: Do we have a direct number, because I'm
06:15:14PM 5 going to give that to my wife and let her talk to you. All
06:15:20PM 6 right, thank you. We'll be in adjournment.

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